

Administrative Conference of the United States



76th Plenary Session
December 16, 2021



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agenda for 76th Plenary Session

Thursday, December 16, 2021

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| 9:30 a.m. | Call to Order
Opening Remarks by Vice Chairman Matthew L. Wiener
Initial Business (Vote on Adoption of Minutes of June and September 2021 Plenary Sessions and Resolution Governing the Order Business) |
| 9:50 a.m. | Consider Proposed Recommendation: <i>Public Access to Agency Adjudicative Proceedings</i> |
| 11:05 a.m. | Consider Proposed Recommendation: <i>Public Availability of Inoperative Agency Guidance Documents</i> |
| 12:20 p.m. | Update on Pending Projects by Research Director Reeve T. Bull |
| 12:30 p.m. | Lunch Break |
| 1:00 p.m. | Consider Proposed Recommendation: <i>Technical Reform of the Congressional Review Act</i> |
| 2:15 p.m. | Discuss Possible Future Project(s) on Congressional Review Act Reform |
| 2:30 p.m. | Consider Proposed Recommendation: <i>Regulation of Representatives in Agency [Adjudicative] Proceedings</i> |
| 3:45 p.m. | Consider Proposed Recommendation: <i>Quality Assurance Systems in Agency Adjudication</i> |
| 5:00 p.m. | Discuss Possible Future ACUS Projects (Optional) |
| 5:30 p.m. | Adjourn |



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Resolution Governing the Order of Business

The time initially allotted to each item of business is separately stated in the agenda. Individual comments from the floor shall not exceed five minutes, unless further time is authorized by unanimous consent of the voting members present. A majority of the voting members present may extend debate on any item for up to 30 additional minutes. At any time after the expiration of the time initially allotted to an item, the Chair shall have discretion to move the item to a later position in the agenda.

Unless the Chair determines otherwise, amendments and substitutes to recommendations that have been timely submitted in writing to the Office of the Chairman before the meeting will receive priority in the discussion of any proposed item of business; and other amendments and substitutes to recommendations will be entertained only to the extent that time permits.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

74th Plenary Session

Minutes

June 17, 2021

I. Call to Order and Opening Remarks

The 74th Plenary Session of the Administrative Conference of the United States (ACUS) commenced on June 17, 2021, at approximately 9:30 a.m. ACUS Vice Chairman Matt Wiener called the meeting to order. He introduced the Council Members and the new members who joined ACUS since the last plenary session. Vice Chairman Wiener then spoke in recognition of the late Judge Robert Katzmman of the U.S. Court of Appeals for the Second Circuit and his many contributions to ACUS.

Vice Chairman Wiener briefly described some of the ongoing projects and activities of the Office of the Chairman, including facilitating meetings of the Council of Independent Regulatory Agencies, the Interagency Roundtable, and the Council on Federal Agency Adjudication; establishing the Roundtable on Artificial Intelligence in Federal Agencies and the Alternate Dispute Resolution Advisory Group; the Office of the Chairman's continued involvement as a member of the White House Legal Aid Interagency Roundtable; the progress the Working Group on Compiling Administrative Records has made preparing a guide for agencies on compiling records for judicial review; upcoming forums on Underserved Communities in the Regulatory Process and International Regulatory Cooperation; continued updates to the electronic edition of the *Federal Administrative Procedure Sourcebook*; and the forthcoming *Sourcebook of Federal Judicial Review Statutes*.

Vice Chairman Wiener then briefly described developments in implementing past Conference projects, including the approval by a Judicial Conference advisory committee of amendments to the Federal Rules of Civil Procedure governing judicial review of Social Security decisions in federal district court, made in response to Recommendation 2016-3, *Special Rules for Social Security Litigation in District Court*; continued reliance by federal agencies on Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*; and a recent report by the Government Accountability Office indicating that nearly all federal agencies have updated their civil penalties to adjust for inflation as required by amendments to the Inflation Adjustment Act—amendments enacted in direct response to Recommendation 2012-8, *Inflation Adjustment Act*.

II. Initial Business and Introduction to Recommendations

Before consideration of the proposed recommendations, Vice Chairman Wiener thanked staff, committee chairs, and consultants for their work on the proposed recommendations, particularly in light of the ongoing COVID-19 pandemic. Vice Chairman Wiener then reviewed the rules for debating and voting on matters at the Plenary Session. Conference members then

approved the minutes from the 73rd Plenary Session and adopted the order of business for the 74th Plenary Session.

III. Proposed Recommendation: Clarifying Statutory Access to Judicial Review of Agency Action

Vice Chairman Wiener introduced the proposed Recommendation, thanking Kristin Hickman, Public Member and Chair of the Committee on Judicial Review as well as project consultant Jonathan Siegel, Senior Fellow. Mr. Siegel provided an overview of the report, and Ms. Hickman discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation and amendments. Various amendments were considered and adopted, but the time allotted for deliberation on the proposed Recommendation, as then amended, expired while deliberation was not yet complete. Vice Chairman Wiener raised the possibility of remanding the proposed Recommendation to the Committee for additional meetings and deliberation followed by the submission of an amended proposed Recommendation to the Conference for a vote at a later plenary session. This proposal was adopted without objection by the Conference, and the Recommendation as amended was remanded to the Committee on Judicial Review.

IV. Proposed Recommendation: Mass, Computer-Generated, and Fraudulent Comments

Vice Chairman Wiener introduced the proposed Recommendation, thanking Cary Coglianese, Public Member and Chair of the Committee on Rulemaking, as well as project consultants Steve Balla, Reeve Bull, ACUS Research Director, Bridget Dooling, Senior Fellow, Emily Hammond, Michael Herz, Senior Fellow, Michael Livermore, Public Member, and Beth Simone Noveck. Mr. Herz provided an overview of the report, and Mr. Coglianese discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation and amendments, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

V. Remarks by Council Member Adrian Vermeule

Vice Chairman Wiener then recognized Adrian Vermeule, ACUS Council Member, who delivered remarks about his new book, *Law and Leviathan: Redeeming the Administrative State*, coauthored with Cass Sunstein.

VI. Proposed Recommendation: Periodic Retrospective Review

Vice Chairman Wiener introduced the proposed Recommendation, thanking Aaron Nielson, Public Member and Chair of the Committee on Administration and Management as well as project consultants Lori Bennear and Jonathan Wiener, Public Member. Mr. Wiener provided an overview of the report, and Mr. Nielson discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation and amendments, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

VII. Proposed Recommendation: Early Input on Regulatory Alternatives

Vice Chairman Wiener introduced the proposed Recommendation, thanking Connor Raso, Government Member and Chair of the Committee on Regulation as well as project consultants Christopher Carrigan and Stuart Shapiro. Mr. Shapiro provided an overview of the report, and Mr. Raso discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation and amendments, and various amendments were considered and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

VIII. Proposed Recommendation: Virtual Hearings in Agency Adjudication

Vice Chairman Wiener introduced the proposed Recommendation, thanking Nadine Mancini, Government Member and Chair of the Committee on Adjudication as well as project consultants Frederic Lederer and the Center for Legal and Court Technology at William and Mary. Vice Chairman Wiener additionally thanked Jeremy Graboyes, ACUS Principal Deputy Research Director and author of a staff report on virtual hearings that assisted the Committee's deliberations. Mr. Lederer provided an overview of his report, and Ms. Mancini discussed the Committee's deliberations. Vice Chairman Wiener then turned to discussion of the proposed Recommendation and amendments, and various amendments were discussed and adopted. Vice Chairman Wiener called for a vote on the Recommendation as amended, and the Recommendation was adopted.

IX. Pending Assembly Projects

Vice Chairman Wiener recognized Reeve Bull, ACUS Research Director, for a presentation on pending and forthcoming Assembly projects, explaining that Assembly projects are those intended to result in a formal recommendation of the Assembly. Mr. Bull then briefly described pending or potential Assembly projects, including: *Automated Legal Guidance at Federal Agencies*; *Public Availability of Inoperative Agency Guidance Documents*; *Quality Assurance Systems in Agency Adjudication*; *Regulation of Representatives in Agency Proceedings*; *Public Access to Agency Adjudicative Proceedings*; and *Technical Reform of the Congressional Review Act*.

Mr. Bull also discussed several pending projects being undertaken by the Office of the Chairman, including: *Agency Head Enforcement and Adjudication Functions*; *Alternative Dispute Resolution in Agency Adjudication*; *Classification of Agency Guidance*; *Contractors in Rulemakings*; *Improving Notice of Regulatory Changes*; and *Nationwide Injunctions and Federal Regulatory Programs*.

X. Closing Remarks and Adjournment

Vice Chairman Wiener thanked the participants for their hard work and for attending the plenary session. Vice Chairman Wiener thanked ACUS staff for planning and preparing for the plenary session, and particularly: Shawne McGibbon, General Counsel; Harry Seidman, Chief Financial and Operations Officer; Jennyfer Alvarez, Program Manager; Nathan Tomasso, Budget

Analyst; and Jeremy Graboyes, Principal Deputy Research Director. He then adjourned the 74th Plenary Session.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

75th Plenary Session

Minutes

September 13-17, 2021

I. Call to Order

The meeting was called to order at 8:59 a.m. on September 13, 2021, via email to the full Conference membership from the ACUS Acting Chairman Matthew L. Wiener. In that email, the ACUS Assembly was instructed to vote on whether to approve the proposed recommendation, *Clarifying Statutory Access to Judicial Review of Agency Action*, before the voting deadline at noon on September 17, 2021. The Assembly was also instructed to vote using a special mailbox, 75thplenaryvote@acus.gov.

II. Plenary Session Procedures

The procedures were addressed in the call-to-order email noted above, as well as in an earlier August 17, 2021, email from Acting Chairman Wiener to the full Conference membership. The August email supplied information on 1) why the proposed recommendation had been remanded to the Committee on Judicial Review by the ACUS Assembly at its June 2021 plenary session, 2) the results of the deliberations of the Committee, 3) how to comment, and 4) when to vote.

III. Proposed Recommendation on *Clarifying Statutory Access to Judicial Review of Agency Action*

This recommendation urges Congress to enact a cross-cutting statute that addresses certain recurring technical problems in statutory provisions governing judicial review of agency action that may cause unfairness, inefficiency, or unnecessary litigation. It also offers drafting principles for Congress when it writes new or amends existing judicial review statutes. It draws in large part on ACUS's forthcoming *Sourcebook of Federal Judicial Review Statutes*, which analyzes the provisions in the U.S. Code governing judicial review of agency action.

At the June 2021 plenary session, the Assembly remanded the recommendation to the Committee on Judicial Review to address a technical issue related to rulemakings with post-promulgation comment periods. The Committee addressed that matter and unanimously adopted the necessary amendments in the version of the recommendation that was considered at this plenary session.

IV. Vote on Adoption

Acting Chairman Wiener called for a vote (as outlined above) on the recommendation as amended by the Committee on Judicial Review, and the recommendation was adopted after 5 days of asynchronous voting by the Assembly. Out of 86 eligible voting members, 59 voted in favor of the measure and six abstained; none were opposed. Therefore, the recommendation was adopted unanimously by the close of voting at noon on September 17, 2021.

V. Adjournment

The meeting adjourned at the end of the designated voting period.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Bylaws of the Administrative Conference of the United States

[The numbering convention below reflects the original numbering that appeared in Title 1, Code of Federal Regulations (CFR), Part 302, which was last published in 1996. Although the original numbering convention is maintained below, the bylaws are no longer published in the CFR. The official copy of the bylaws is currently maintained on the Conference's website at <https://www.acus.gov/policy/administrative-conference-bylaws>.]

§ 302.1 Establishment and Objective

The Administrative Conference Act, 5 U.S.C. §§ 591 *et seq.*, 78 Stat. 615 (1964), as amended, authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purposes of the Administrative Conference are to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest, to promote more effective participation and efficiency in the rulemaking process, to reduce unnecessary litigation and improve the use of science in the regulatory process, and to improve the effectiveness of laws applicable to the regulatory process. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

§ 302.2 Membership

(a) General

(1) Each member is expected to participate in all respects according to his or her own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly, either in person or by telephone or videoconference if that is permitted for the session or meeting involved. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the nonattendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing



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does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-Government members are appointed by the Chairman with the approval of the Council. The Chairman shall, by random selection, identify one-half of the non-Government members appointed in 2010 to serve terms ending on June 30, 2011, and the other half to serve terms ending on June 30, 2012. Thereafter, all non-Government member terms shall be for two years. No non-Government members shall at any time be in continuous service beyond three terms; provided, however, that such former members may thereafter be appointed as senior fellows pursuant to paragraph (e) of this section; and provided further, that all members appointed in 2010 to terms expiring on June 30, 2011, shall be eligible for appointment to three continuous two-year terms thereafter.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he or she leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he or she enters full-time government service. In the event a non-Government member of the Conference appointed by the Chairman resigns or becomes ineligible to continue as a member, the Chairman shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a member may designate (by e-mail) a suitably informed alternate to participate for a member in a meeting of the committee, and that alternate may have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of or liaisons to the Conference for six or more years, former members who have served as members of the federal judiciary, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals in even-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Senior fellows shall have all the privileges of members, but may not



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vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(f) Special Counsels

The Chairman may, with the approval of the Council, appoint persons who do not serve under any of the other official membership designations to the position of special counsel. Special counsels shall advise and assist the membership in areas of their special expertise. Their terms shall terminate at 2-year intervals in odd-numbered years, renewable for additional 2-year terms at the discretion of the Chairman with the approval of the Council. Special counsels shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

§ 302.3 Committees

(a) Standing Committees

The Conference shall have the following standing committees:

1. Committee on Adjudication
2. Committee on Administration
3. Committee on Judicial Review
4. Committee on Regulation
5. Committee on Rulemaking

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. The Chairman, with the approval of the Council, may establish additional standing committees or rename, modify, or terminate any standing committee.

(b) Special Committees

With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. Such special committees shall expire after two years, unless their term is renewed by the Chairman with the approval of the Council for an additional period not to exceed two years for each renewal term. The Chairman may also terminate any special committee with the approval of the Council when in his or her judgment the committee's assignments have been completed.

(c) Coordination

The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.



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§ 302.4 Liaison Arrangements

(a) Appointment

The Chairman may, with the approval of the Council, make liaison arrangements with representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations. Persons appointed under these arrangements shall have all the privileges of members, but may not vote or make motions, except in committee deliberations, where the conferral of voting rights shall be at the discretion of the committee chairman.

(b) Term

Any liaison arrangement entered into on or before January 1, 2020, shall remain in effect for the term ending on June 30, 2022. Any liaison arrangement entered into after January 1, 2020, shall terminate on June 30 in 2-year intervals in even-numbered years. The Chairman may, with the approval of the Council, extend the term of any liaison arrangement for additional terms of two years. There shall be no limit on the number of terms.

§ 302.5 Avoidance of Conflicts of Interest

(a) Disclosure of Interests

(1) The Office of Government Ethics and the Office of Legal Counsel have advised the Conference that non-Government members are special government employees within the meaning of 18 U.S.C. § 202 and subject to the provisions of sections 201-224 of Title 18, United States Code, in accordance with their terms. Accordingly, the Chairman of the Conference is authorized to prescribe requirements for the filing of information with respect to the employment and financial interests of non-Government members consistent with law, as he or she reasonably deems necessary to comply with these provisions of law, or any applicable law or Executive Order or other directive of the President with respect to participation in the activities of the Conference (including but not limited to eligibility of federally registered lobbyists).

(2) The Chairman will include with the agenda for each plenary session and each committee meeting a statement calling to the attention of each participant in such session or meeting the requirements of this section, and requiring each non-Government member to provide the information described in paragraph (a)(1), which information shall be maintained by the Chairman as confidential and not disclosed to the public. Except as provided in this paragraph (a) or paragraph (b), members may vote or participate in matters before the Conference to the extent permitted by these by-laws without additional disclosure of interest.



(b) Disqualifications

(1) It shall be the responsibility of each member to bring to the attention of the Chairman, in advance of participation in any matter involving the Conference and as promptly as practicable, any situation that may require disqualification under 18 U.S.C. § 208. Absent a duly authorized waiver of or exemption from the requirements of that provision of law, such member may not participate in any matter that requires disqualification.

(2) No member may vote or otherwise participate in that capacity with respect to any proposed recommendation in connection with any study as to which he or she has been engaged as a consultant or contractor by the Conference.

(c) Applicability to Senior Fellows, Special Counsel, and Liaison Representatives

This section shall apply to senior fellows, special counsel, and liaison representatives as if they were members.

§ 302.6 General

(a) Meetings

In the case of meetings of the Council and plenary sessions of the Assembly, the Chairman (and, in the case of committee meetings, the committee chairman) shall have authority in his or her discretion to permit attendance by telephone or videoconference. All sessions of the Assembly and all committee meetings shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to special counsel, and to liaison representatives (and to consultants and staff members insofar as matters on which they have been engaged are under consideration), and to persons who, prior to the commencement of the session or meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly (or, in the case of committee meetings, the approval of the chairman of the committee and unanimous consent of the committee).

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council. Action by the Council may be effected either by meeting or by individual vote, recorded either in writing or by electronic means.

(c) Proposed Amendments at Plenary Sessions

Any amendment to a committee-proposed recommendation that a member wishes to move at a plenary session should be submitted in writing in advance of that session by the date established by the Chairman. Any such pre-submitted amendment, if supported by a proper



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motion at the plenary session, shall be considered before any amendments that were not pre-submitted. An amendment to an amendment shall not be subject to this rule.

(d) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation. A member's failure to file or join in such a separate statement does not necessarily indicate his or her agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Director not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(e) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(f) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.



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Public Meeting Policies and Procedures

(Updated December 2, 2020)

Note: Modified policies may be used during the COVID-19 pandemic, during which ACUS meetings are being held remotely.

The Administrative Conference of the United States (the “Conference”) adheres to the following policies and procedures regarding the operation and security of committee meetings and plenary sessions open to the public.

Public Notice of Plenary Sessions and Committee Meetings

The Administrative Conference will publish notice of its plenary sessions in the *Federal Register* and on the Conference’s website, www.acus.gov. Notice of committee meetings will be posted only on the Conference website. Barring exceptional circumstances, such notices will be published 15 calendar days before the meeting in question. Members of the public can also sign up to receive meeting alerts at acus.gov/subscribe.

Public Access to Meetings

Members of the public who wish to attend a committee meeting or plenary session in person or remotely should RSVP online at www.acus.gov no later than two business days before the meeting. To RSVP for a meeting, go to the Calendar on ACUS’s website, click the event you would like to attend, and click the “RSVP” button. ACUS will reach out to members of the public who have RSVP’d if the meeting space cannot accommodate all who wish to attend in person.

Members of the public who wish to attend a meeting held at ACUS headquarters should first check in with security at the South Lobby entrance of Lafayette Centre, accessible from 20th Street and 21st Street NW. Members of the public who wish to attend an ACUS-sponsored meeting held at another facility should follow that facility’s access procedures.

The Conference will make reasonable efforts to provide interested members of the public remote access to all committee meetings and plenary sessions and to provide access on its website to archived video of committee meetings and plenary sessions. The Conference will make reasonable efforts to post remote access information or instructions for obtaining remote access information on its website no later than four calendar days before a meeting. The *Federal Register* notice for each plenary session will also include remote access information or instructions for obtaining remote access information.



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Participation in Meetings

The 101 statutory members of the Conference as well as liaison representatives, special counsel, and senior fellows may speak at plenary sessions and committee meetings. Voting at plenary sessions is limited to the 101 statutory members of the Conference. Statutory members may also vote in their respective committees. Liaison representatives, special counsel, and senior fellow may vote in their respective committees at the discretion of the Committee Chair.

The Conference Chair, or the Committee Chair at committee meetings, may permit a member of the public to speak with the unanimous approval of all present voting members. The Conference expects that every public attendee will be respectful of the Conference's staff, members, and others in attendance. A public attendee will be considered disruptive if he or she speaks without permission, refuses to stop speaking when asked by the Chair, acts in a belligerent manner, or threatens or appears to pose a threat to other attendees or Conference staff. Disruptive persons may be asked to leave and are subject to removal.

Written Public Comments

To facilitate public participation in committee and plenary session deliberations, the Conference typically invites members of the public to submit comments on the report(s) or recommendation(s) that it will consider at an upcoming committee meeting or plenary session.

Comments can be submitted online by clicking the "Submit a comment" button on the webpage for the project or event. Comments that cannot be submitted online can be mailed to the Conference at 1120 20th Street NW, Suite 706 South, Washington, DC 20036.

Members of the public should make sure that the Conference receives comments before the date specified in the meeting notice to ensure proper consideration.

Disability or Special Needs Accommodations

The Conference will make reasonable efforts to accommodate persons with physical disabilities or special needs. If you need special accommodations due to a disability, you should contact the Staff Counsel listed on the webpage for the event or the person listed in the *Federal Register* notice no later than seven business days before the meeting.



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Council Members

Name	Organization	Title
Funmi Olorunnipa Badejo	White House Counsel's Office	Special Assistant to the President and Associate White House Counsel
Ronald A. Cass	Cass & Associates, PC	President
Jeffrey M. Harris	Consovoy McCarthy PLLC	Partner
Leslie B. Kiernan	U.S. Department of Commerce	General Counsel
Donald F. McGahn II	Jones Day	Practice Leader of Government Regulation
Michael H. McGinley	Dechert LLP	Partner
Matthew E. Morgan	Barnes & Thornburg LLP	Partner
Nitin Shah	U.S. General Services Administration	General Counsel
Adrian Vermeule	Harvard Law School	Ralph S. Tyler, Jr. Professor of Constitutional Law
Matthew L. Wiener	Administrative Conference of the U.S.	Acting Chairman, Vice Chairman, and Executive Director

Government Members

Name	Organization	Title
James L. Anderson	Federal Deposit Insurance Corporation	Deputy General Counsel, Supervision and Legislation Branch
David J. Apol	U.S. Office of Government Ethics	General Counsel
Gregory R. Baker	Federal Election Commission	Deputy General Counsel for Administration
Eric S. Benderson	U.S. Small Business Administration	Associate General Counsel for Litigation & Claims



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Krystal J. Brumfield	U.S. General Services Administration	Associate Administrator for the Office of Government-wide Policy
Daniel Cohen	U.S. Department of Transportation	Assistant General Counsel for Regulation
Michael J. Cole	Federal Mine Safety and Health Review Commission	Senior Attorney, Office of General Counsel
Peter J. Constantine	U.S. Department of Labor	Associate Solicitor, Office of Legal Counsel
Anika S. Cooper	Surface Transportation Board	Deputy General Counsel
Hampton Y. Dellinger	U.S. Department of Justice	Assistant Attorney General for the Office of Legal Policy
Elizabeth H. Dickinson	U.S. Food & Drug Administration	Senior Deputy Chief Counsel
Robert J. Girouard	U.S. Office of Personnel Management	Senior Counsel, Office of General Counsel
Ami M. Grace-Tardy	U.S. Department of Energy	Assistant General Counsel for Legislation, Regulation, & Energy Efficiency
Gina K. Grippando	U.S. International Trade Commission	Assistant General Counsel for Administrative Law
Richard J. Hipolit	U.S. Department of Veterans Affairs	Deputy General Counsel for Legal Policy
Janice L. Hoffman	Centers for Medicare & Medicaid Services	Associate General Counsel
Erica Hough	Federal Energy Regulatory Commission	Deputy Associate General Counsel
Paul S. Koffsky	U.S. Department of Defense	Senior Deputy General Counsel and Deputy General Counsel (Personnel and Health Policy)
Alice M. Kottmyer	U.S. Department of State	Attorney Adviser
Katia Kroutil	Federal Maritime Commission	Assistant General Counsel for General Law & Regulation
Tristan L. Leavitt	U.S. Merit Systems Protection Board	Acting Chief Executive and Administrative Officer



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Hilary Malawer	U.S. Department of Education	Deputy General Counsel, Office of the General Counsel
Nadine N. Mancini	Occupational Safety and Health Review Commission	General Counsel
Christina E. McDonald	U.S. Department of Homeland Security	Associate General Counsel for Regulatory Affairs, Office of the General Counsel
Patrick R. Nagle	Social Security Administration	Chief Administrative Law Judge
Mitchell E. Plave	Office of the Comptroller of the Currency	Special Counsel, Bank Activities
Connor N. Raso	U.S. Securities and Exchange Commission	Senior Counsel, Office of General Counsel
Carrie F. Ricci	U.S. Department of Agriculture	Associate General Counsel for Marketing, Regulatory, and Food Safety Programs
Roxanne L. Rothschild	National Labor Relations Board	Executive Secretary
Jay R. Schwarz	Board of Governors of the Federal Reserve System	Senior Counsel, Legal Division
Helen Serassio	U.S. Environmental Protection Agency	Associate General Counsel, Cross- Cutting Issues Law Office
Robert F. Stone	Occupational Safety and Health Administration	Sr. Policy Economist, Directorate of Standards and Guidance
Stephanie J. Tatham	Office of Management and Budget	Senior Policy Analyst and Attorney, Office of Information and Regulatory Affairs
Drita Tonuzi	Internal Revenue Service	Deputy Chief Counsel (Operations), Office of the Chief Counsel
David A. Trissell	U.S. Postal Regulatory Commission	General Counsel
Miriam E. Vincent	National Archives and Records Administration	Acting Director, Legal Affairs and Policy Division, Office of the Federal Register



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Kenny A. Wright	Federal Trade Commission	Legal Counsel, Office of the General Counsel
Chin Yoo	Federal Communications Commission	Deputy Associate General Counsel
Marian L. Zobler	U.S. Nuclear Regulatory Commission	General Counsel

Public Members

Name	Organization	Title
Katherine Twomey Allen		Former Deputy Associate Attorney General, Office of the Associate Attorney General, U.S. Department of Justice
Kent H. Barnett	University of Georgia School of Law	Associate Dean for Academic Affairs & J. Alton Hosch Professor of Law
Jack M. Beermann	Boston University School of Law	Professor of Law and Harry Elwood Warren Scholar
Susan G. Braden		Former Chief Judge, U.S. Court of Federal Claims
Emily S. Bremer	University of Notre Dame Law School	Associate Professor of Law
Cary Coglianese	University of Pennsylvania Carey Law School	Edward B. Shils Professor of Law; Director, Penn Program on Regulation
Ilona R. Cohen	Aledade, Inc.	Chief Legal Officer
Kirti Datla	Earthjustice	Director of Strategic Legal Advocacy
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Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation | December 16, 2021

1 Agencies adjudicate millions of cases each year. The matters they adjudicate are diverse,
2 as are the processes they use to do so. Some processes are trial-like; others are informal. Some
3 are adversarial; others are non-adversarial. Agencies conduct many different types of
4 proceedings in the course of adjudicating cases, such as investigatory hearings, prehearing and
5 scheduling conferences, settlement conferences, evidentiary hearings, and appellate arguments.
6 Members of the public—participants’ family and friends, media representatives, representatives
7 of non-governmental organizations, researchers, and others—may seek to observe adjudicative
8 proceedings for any number of reasons.

9 Agencies must determine whether and how to allow public access to the proceedings they
10 conduct. The Constitution and federal statutes establish the basic parameters for that
11 determination. The Supreme Court has interpreted the First Amendment to provide a general
12 right of public access to judicial proceedings,¹ and a number of federal courts have held that the
13 same right extends to at least some proceedings conducted by administrative agencies.² Federal
14 statutes, such as the Government in the Sunshine Act³ and certain statutes specific to particular
15 programs and agencies, require that agencies open or close adjudicative proceedings or certain
16 portions thereof to public observation. Agencies may need to transcribe or record certain

¹ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 55 (1980).

² See Jeremy Graboyes & Mark Thomson, *Public Access to Agency Adjudicative Proceedings* 10–12 (Oct. 15, 2021) (draft report to the Admin. Conf. of the U.S.).

³ 5 U.S.C. § 552b.



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adjudicative proceedings and may be required, under the Federal Advisory Committee Act⁴ or other laws, to make such records publicly available.⁵ Conversely, the Privacy Act⁶ and other laws and executive-branch policies may require agencies to protect sensitive interests and information.

On top of these constitutional and statutory requirements, many agencies have adopted their own policies regarding public access to adjudicative proceedings.⁷ Settling on a sound policy for determining which proceedings should be open to public observation can require balancing different, and sometimes conflicting, interests. Proceedings open to public observation promote transparency, public accountability, and public understanding of agency decision making. Openness encourages fair process for private parties and promotes accurate and efficient decision making by subjecting arguments and evidence to public scrutiny. And many participants, especially self-represented parties, people with disabilities, and children, benefit from having a family member, friend, personal care attendant, case worker, or other supportive member of the public present at their proceedings.

As with any legal proceeding, however, there can be drawbacks to opening adjudicative proceedings to the public. Many adjudications involve sensitive information that would be publicly disclosed in an open proceeding. Public disclosure of unverified information or unproven allegations may result in unwarranted reputational harm to private parties. Just as open

⁴ 5 U.S.C. App. 11. Although the Federal Advisory Committee Act principally governs the operation of advisory committees, section 11 of the Act requires agencies to “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” 5 U.S.C. App. 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* 11(b).

⁵ The Administrative Conference has recommended that agencies consider providing access on their websites to supporting adjudicative materials issued and filed in adjudicative proceedings. Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017). Online disclosure of transcripts and recordings of adjudicative proceedings and real-time broadcast of open proceedings can save staff time or money through a reduction in the volume of Freedom of Information Act (FOIA) requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests.

⁶ *Id.* § 552a.

⁷ See Graboyes & Thomson, *supra* note 2.



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proceedings allow family members and other supportive members of the public to accompany participants, they also allow in those who would intimidate or harass. Openness may also affect the dynamic of agency proceedings, leaving them vulnerable to disruption or leading them to become unduly adversarial or protracted. There can also be administrative costs associated with facilitating in-person or remote observation of adjudicative proceedings by members of the public, providing advance public notice of open proceedings, and providing access to transcripts and recordings of open proceedings. These costs may be warranted in some circumstances but not others.

This Recommendation recognizes that agency adjudicative proceedings vary widely in their purpose, complexity, and governing law and the degree of public interest they attract. It also recognizes that not all agencies can bring the same resources to bear in addressing public access to their adjudicative proceedings. In offering these best practices, the Administrative Conference encourages agencies to develop policies that, in addition to complying with all relevant constitutional and statutory requirements for public access, recognize the benefits of public access for members of the public, private parties, agencies, and other participants and account for any countervailing interests, such as privacy and confidentiality.

RECOMMENDATION

Policies for Public Access to Agency Adjudicative Proceedings

1. Agencies should promulgate and publish procedural regulations governing public access to their adjudicative proceedings in the *Federal Register* and codify them in the *Code of Federal Regulations*. In formulating these regulations, agencies, in addition to adhering to any constitutional or statutory requirements for public access, should consider the benefits of public access and countervailing interests, such as privacy and confidentiality, as elaborated in Paragraph 6. These regulations should include the following:
 - a. A list of proceedings that should be categorically or presumptively open or closed, and standards for determining when adjudicators may or must depart from such presumption in individual cases (see Paragraphs 5–7);



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- b. The manners in which members of the public can observe open proceedings, for example by attending in person (e.g., at an agency hearing room) or by remote means (e.g., online or by telephone) (see Paragraphs 8–14);
 - c. Requirements, if any, for advance public notice of proceedings, whether open or closed (see Paragraphs 11–14); and
 - d. The public availability of and means of accessing transcripts and audio and video recordings of proceedings (see Paragraphs 15–17).
 2. In conjunction with such regulations, agencies should develop guidelines that set forth, in plain language, the following information for proceedings that are open to the public:
 - a. The manner in which agencies will communicate the schedule of upcoming proceedings to the public;
 - b. The location at and manner in which members of the public can observe proceedings;
 - c. The registration process, if any, required for members of the public to observe proceedings and how they should register;
 - d. The agency official whom members of the public should contact if they have questions about observing proceedings;
 - e. Any instructions for accessing agency or non-agency facilities where proceedings are held;
 - f. Any requirements for conduct by public observers (e.g., regarding the possession and use of electronic devices);
 - g. Any protocols for facilitating media coverage; and
 - h. Any policies for managing proceedings that attract high levels of public interest.
 3. Agencies should also consider whether presumptively closed proceedings may be open to select members of the public, such as family members or caregivers, and, if so, develop guidelines for such situations that address, as relevant, the information in Paragraph 2.
 4. Agencies should post the regulations described in Paragraph 1, the guidelines described in Paragraphs 2 and 3, and any other information about public access to adjudicative proceedings, in an appropriate location on their websites.



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Standards and Procedures for Determining Which Adjudicative Proceedings Are Open or Closed

89 5. Agencies should adopt the presumption that evidentiary hearings and appellate
90 proceedings (including oral arguments) are open to public observation and may be
91 closed, in whole or in part, only to the extent consistent with the First Amendment and
92 other potential constitutional and statutory bases for requiring open proceedings, and only
93 to the extent necessary to protect compelling interests such as:

- 94 a. National security;
- 95 b. Law enforcement interests;
- 96 c. Confidentiality of sensitive business information;
- 97 d. Especially sensitive personal privacy interests;
- 98 e. The interests of minors and juveniles; and
- 99 f. Other interests protected by statute or regulation.

100 In some programs, it may be that the need to protect one or more of these interests or
101 categories of information will ordinarily outweigh the public interest in open
102 proceedings. For such programs, agencies may presume that all parts of proceedings will
103 be closed to public observation while retaining the ability to open these proceedings, in
104 whole or in part, in particular cases or to particular individuals.

105 6. Agencies should consider whether types of adjudicative proceedings other than
106 evidentiary hearings and appellate proceedings (such as investigatory hearings and
107 prehearing conferences), which are typically closed, should be open to public
108 observation. In doing so, agencies, in addition to adhering to any constitutional or
109 statutory requirements for public access, should consider, at a minimum, the following:

- 110 a. Whether public access would promote important policy objectives such as
111 transparency, fairness to parties, accurate and efficient development of records for
112 decisionmaking, or public participation in agency decision making;
- 113 b. Whether public access would impede important policy objectives such as
114 encouraging candor, achieving consensus, deciding cases and resolving disputes



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in an efficient manner, preventing intimidation or harassment of participants, avoiding unwarranted reputational harm to participants, or protecting national security, law enforcement, confidentiality of sensitive business information, especially sensitive personal privacy interests, the interests of minors and juveniles, and other similarly compelling interests;

- c. Whether such proceedings or the broader adjudication process of which the proceeding at issue is a part typically include opportunities for public access;
- d. Whether there is often public interest in observing such proceedings; and
- e. Whether matters to be discussed at such proceedings ordinarily involve issues of broad public interest or the interests of persons beyond the parties.

7. Agencies should adopt processes for departing from or considering requests to depart from a presumption of open or closed proceedings in particular cases. Agencies should consider addressing the following topics in the procedural regulations described in Paragraph 1:

- a. How parties to a case can request that proceedings that are presumptively open to public observation be closed or that proceedings that are presumptively closed to public observation be open to particular individuals or the general public;
- b. How non-parties to a case can request access, for themselves or the general public, to proceedings that are presumptively closed to public observation;
- c. How parties and non-parties can respond or object to requests regarding public access made in subparagraphs (a) or (b);
- d. Under what circumstances adjudicators or other agency officials can, on their own motion, close proceedings that are presumptively open to public observation or open proceedings that are presumptively closed to public observation;
- e. Whether and how adjudicators or other agency officials must document and notify participants about decisions regarding public access; and
- f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to whom, and how they may do so.



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Manner of Public Observation of Open Adjudicative Proceedings

8. When adjudicators conduct open proceedings in public hearing rooms, members of the public should have the opportunity to observe the proceedings from the rooms in which they are conducted, subject to reasonable security protocols, resource and space constraints, and concerns about disruptions.
9. Agencies should provide all or select members of the public the opportunity to observe open adjudicative proceedings remotely. Agencies should provide remote access in a way that is appropriate for a particular proceeding, such as by providing a dial-in number to select members of the public on request or by livestreaming audio or video of the proceedings to the general public online. Agencies should structure remote access in a way that avoids disruptions, such as by ensuring that public observers cannot unmute themselves or use chat, screen-sharing, document-annotation, file-sharing functions common in internet-based videoconferencing software. Agencies should be aware that members of the public, including the press, may choose to record and disseminate audio or video transmissions in whole or in part regardless of the rules that may apply in physical hearing rooms.
10. Agencies should consider whether interested members of the public are likely to encounter any barriers to accessing open adjudicative proceedings and, if so, take steps to remedy them. For example, measures may be needed to accommodate people with disabilities, people for whom it may be difficult to make arrangements to travel to locations where proceedings are conducted, and people who do not have access to electronic devices or private internet services necessary to observe proceedings remotely. Agencies may also need to adjust security protocols at the facilities where proceedings are conducted to facilitate in-person attendance while still accounting for reasonable security needs.



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Advance Public Notice of Adjudicative Proceedings

11. Agencies should provide advance public notice of open adjudicative proceedings and consider whether to provide advance public notice of closed proceedings, so that the public is aware of such proceedings and can request access to them as specified in Paragraph 7(b). Agencies that determine that advance public notice would be beneficial should consider (a) the best places and publications for providing such notice, (b) the information provided in the notice, and (c) the timing of the notice. Agencies that regularly conduct open proceedings should also consider maintaining a schedule of and information about upcoming proceedings in an appropriate location on their websites.
12. To determine the best places and publications for providing advance public notice of adjudicative proceedings, agencies should consider their needs and available resources and the individuals, communities, and organizations that are likely to be interested in or affected by such proceedings. Places and publications where agencies might provide public notice of proceedings include:
- a. The *Federal Register*;
 - b. A press release, digest, newsletter, or blog post published by the agency;
 - c. An agency events calendar;
 - d. Social media;
 - e. A newspaper or other media outlet that members of the public who may be interested in observing the proceeding are likely to monitor;
 - f. A physical location that potentially interested members of the public are likely to see (e.g., a bulletin board at a jobsite or agency office);
 - g. An email sent to persons who have subscribed to a mailing list or otherwise opted to receive updates about a particular adjudication; and
 - h. A communication sent directly to members of the public, communities, and organizations who may be interested in observing the proceeding.
13. Agencies should include the following information in any public notice for an open adjudicative proceeding, as applicable:



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- a. The name and docket number or other identifying information for the proceeding;
 - b. The date and time of the proceeding;
 - c. The ways that members of the public can observe the proceeding, along with the directions, if any, for registering or requesting access to the proceeding and, for in-person observers, instructions for accessing the facility where the proceeding will take place, including any security or public health protocols and disability accommodations;
 - d. A brief summary of the proceeding's purpose; and
 - e. Contact information for a person who can answer questions about the proceeding.
14. Agencies should determine the appropriate timing for providing and updating public notice of adjudicative proceedings given the nature of their programs and the proceeding at issue. More advance notice may be warranted, for example, if significant public interest in an open proceeding is likely and interested members of the public will need to travel to observe it in person.

Public Access to Transcripts and Recordings of Adjudicative Proceedings

15. Consistent with applicable constitutional and statutory requirements and the objectives identified in Paragraph 1, agencies should consider how they make transcripts and recordings of adjudicative proceedings available to interested members of the public. In addition to providing public access to such materials on their websites, an agency might also, as appropriate:
- a. Make transcripts and recordings available for public inspection in a reading room, docket office, or other agency facility;
 - b. Make transcripts and recordings available for public inspection on another public website, such as a public video sharing website; or
 - c. Provide, or arrange for court reporters working under contract with the government to provide, copies of transcripts and recordings on request for a fee that is no more than the actual cost of duplication, though the agency may charge a reasonable, additional fee for expedited processing.



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- 221 16. Agencies should take steps to redact any information that is protected by law or policy
222 from public disclosure before providing public access to transcripts and recordings.
223 17. Agencies should ensure that transcripts and recordings of open proceedings are available
224 for public inspection in a timely manner.



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Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation | December 16, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council (with source shown in the margin).

1 Agencies adjudicate millions of cases each year. The matters they adjudicate are diverse,
2 as are the processes they use to do so. Some processes are trial-like; others are informal. Some
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8 proceedings for any number of reasons.

9 Agencies must determine whether and how to allow public access to the proceedings they
10 conduct. ~~Federal statutes govern how agencies manage public access in some contexts. The~~
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² See Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Proceedings 10–12 (Oct. 15, 2021) (draft report to the Admin. Conf. of the U.S.).



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Government in the Sunshine Act³ and certain statutes specific to particular programs and agencies, require that agencies open or close adjudicative proceedings or certain portions thereof to public observation.⁴ Agencies may need to transcribe or record certain adjudicative proceedings and may be required, under the Federal Advisory Committee Act⁵ or other laws, to make such records publicly available.⁶ Conversely, the Privacy Act⁷ and other laws and executive-branch policies may require agencies to protect sensitive interests and information.

On top of these constitutional and statutory legal requirements, many agencies have adopted their own policies regarding public access to adjudicative proceedings.⁸ Settling on a sound policy for determining which proceedings should be open to public observation can require balancing different, and sometimes conflicting, interests. Proceedings open to public observation promote transparency, public accountability, and public understanding of agency decision making. Openness encourages fair process for private parties and promotes accurate and efficient decision making by subjecting arguments and evidence to public scrutiny. And many participants, especially self-represented parties, people with disabilities, and children, benefit

Commented [CA1]: Proposed Amendment from Council #1 (including footnote 4; see also related amendments at lines 21, 48, 54, 111–12, and 212):

The Supreme Court has not clearly interpreted the First Amendment to provide a general right of public access to government proceedings outside the criminal context. The proposed footnote explains, without definitively stating that such a right exists for administrative proceedings, that agencies should be aware that some have asserted such a right and that lower courts have reached different conclusions on whether and when such a right exists.

Commented [CA2]: Proposed Amendment from Council #1 (see related amendments at lines 10–17 and parallel amendments at lines 48, 54, 111–12, and 212)

³ 5 U.S.C. § 552b.

⁴ Members of the public have, in some instances, asserted a right under the First Amendment to access certain agency adjudicative proceedings. See Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Proceedings 10–12 (Nov. 22, 2021). Courts have reached different conclusions on whether and in what circumstances such a right exists for administrative proceedings. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002), with *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 212–213 (3d Cir. 2002). Although the issue is infrequently litigated, agencies should be aware of such opinions when establishing policies on public access and responding to requests for public access to proceedings they conduct.

⁵ 5 U.S.C. App. 112, § 11. Although the Federal Advisory Committee Act principally governs the operation of advisory committees, section 11 of the Act requires agencies to “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” 5 U.S.C. App. 112, § 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* § 11(b).

⁶ The Administrative Conference has recommended that agencies consider providing access on their websites to supporting adjudicative materials issued and filed in adjudicative proceedings. Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017). Online disclosure of transcripts and recordings of adjudicative proceedings and real-time broadcast of open proceedings can save staff time or money through a reduction in the volume of Freedom of Information Act (FOIA) requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests.

⁷ *Id.* § 552a.

⁸ See Graboyes & Thomson, *supra* note 2.



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from having a family member, friend, personal care attendant, case worker, or other supportive member of the public present at their proceedings.

As with any legal proceeding, however, there can be drawbacks to opening adjudicative proceedings to the public. Many adjudications involve sensitive information that would be publicly disclosed in an open proceeding. Public disclosure of unverified information or unproven allegations may result in unwarranted reputational harm to private parties. Just as open proceedings allow family members and other supportive members of the public to accompany participants, they also allow in those who would intimidate or harass. Openness may also affect the dynamic of agency proceedings, leaving them vulnerable to disruption or leading them to become unduly adversarial or protracted. There can also be administrative costs associated with facilitating in-person or remote observation of adjudicative proceedings by members of the public, providing advance public notice of open proceedings, and providing access to transcripts and recordings of open proceedings. These costs may be warranted in some circumstances but not others.

This Recommendation recognizes that agency adjudicative proceedings vary widely in their purpose, complexity, and governing law and the degree of public interest they attract. It also recognizes that not all agencies can bring the same resources to bear in addressing public access to their adjudicative proceedings. In offering these best practices, the Administrative Conference encourages agencies to develop policies that, in addition to complying with all relevant constitutional and statutory legal requirements for public access, recognize the benefits of public access for members of the public, private parties, agencies, and other participants and account for any countervailing interests, such as privacy and confidentiality.

Commented [CA3]: Proposed Amendment from Council #1 (see related amendments at lines 10–17 and parallel amendments at lines 21, 54, 111–12, and 212)

RECOMMENDATION

Policies for Public Access to Agency Adjudicative Proceedings

1. Agencies should promulgate and publish procedural regulations governing public access to their adjudicative proceedings in the *Federal Register* and codify them in the *Code of*



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53 *Federal Regulations*. In formulating these regulations, agencies, in addition to adhering
54 to any ~~constitutional or statutory~~ legal requirements for public access, should consider the
55 benefits of public access and countervailing interests, such as privacy and confidentiality,
56 as elaborated in Paragraph 6. These regulations should include the following:

- 57 a. A list of proceedings that should be categorically or presumptively open or
58 closed, and standards for determining when adjudicators may or must depart from
59 such presumption in individual cases (see Paragraphs 5–7);
 - 60 b. The manners in which members of the public can observe open proceedings, for
61 example by attending in person (e.g., at an agency hearing room) or by remote
62 means (e.g., online or by telephone) (see Paragraphs 8–14);
 - 63 c. Requirements, if any, for advance public notice of proceedings, whether open or
64 closed (see Paragraphs 11–14); and
 - 65 d. The public availability of and means of accessing transcripts and audio and video
66 recordings of proceedings (see Paragraphs 15–17).
- 67 2. In conjunction with such regulations, agencies should develop guidelines that set forth, in
68 plain language, the following information for proceedings that are open to the public:
- 69 a. The manner in which agencies will communicate the schedule of upcoming
70 proceedings to the public;
 - 71 b. The location at and manner in which members of the public can observe
72 proceedings;
 - 73 c. The registration process, if any, required for members of the public to observe
74 proceedings and how they should register;
 - 75 d. The agency official whom members of the public should contact if they have
76 questions about observing proceedings;
 - 77 e. Any instructions for accessing agency or non-agency facilities where proceedings
78 are held;
 - 79 f. Any requirements for conduct by public observers (e.g., regarding the possession
80 and use of electronic devices);
 - 81 g. Any protocols for facilitating media coverage; and

Commented [CA4]: Proposed Amendment from Council #1
(see related amendments at lines 10–17 and parallel
amendments at lines 21, 48, 111–12, and 212)



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- h. Any policies for managing proceedings that attract high levels of public interest.
3. Agencies should also consider whether presumptively closed proceedings may be open to select members of the public, such as family members or caregivers, and, if so, develop guidelines for such situations that address, as relevant, the information in Paragraph 2.
4. Agencies should post the regulations described in Paragraph 1, the guidelines described in Paragraphs 2 and 3, and any other information about public access to adjudicative proceedings, in an appropriate location on their websites.

Standards and Procedures for Determining Which Adjudicative Proceedings Are Open or Closed

5. Agencies ~~ordinarily~~ should ~~adopt the presumption~~ presume that evidentiary hearings and appellate proceedings (including oral arguments) are open to public observation. Such proceedings and may be closed, in whole or in part, ~~only~~ to the extent consistent with applicable law and if there is substantial justification to do so. the First Amendment and other potential constitutional and statutory bases for requiring open proceedings, and only to the extent necessary to protect compelling interests such as: Substantial justification may exist, for example, when the need to protect one or more of the following interests can reasonably be considered to outweigh the public interest in openness:
- a. National security;
 - b. Law enforcement interests;
 - c. Confidentiality of sensitive business information;
 - d. ~~Especially sensitive p~~Personal privacy interests;
 - e. The interests of minors and juveniles; and
 - f. Other interests protected by statute or regulation.

~~In some programs, it may be that the need to protect one or more of these interests or categories of information will ordinarily outweigh the public interest in open proceedings. For such programs, agencies may presume that all parts of proceedings will be closed to public observation while retaining the ability to open these proceedings, in whole or in part, in particular cases or to particular individuals.~~

Commented [CA5]: Proposed Amendment from Council #2



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6. Agencies should consider whether types of adjudicative proceedings other than evidentiary hearings and appellate proceedings (such as investigatory hearings and prehearing conferences), which are typically closed, should be open to public observation. In doing so, agencies, in addition to adhering to any ~~constitutional or statutory/legal~~ requirements for public access, should consider, ~~at a minimum,~~ the following:
- Whether public access would promote important policy objectives such as transparency, fairness to parties, accurate and efficient development of records for decisionmaking, or public participation in agency decision making;
 - Whether public access would impede important policy objectives such as encouraging candor, achieving consensus, deciding cases and resolving disputes in an efficient manner, preventing intimidation or harassment of participants, avoiding unwarranted reputational harm to participants, or protecting national security, law enforcement, confidentiality of sensitive business information, especially sensitive personal privacy interests, the interests of minors and juveniles, and other similarly compelling interests;
 - Whether such proceedings or the broader adjudication process of which the proceeding at issue is a part typically include opportunities for public access;
 - Whether there is often public interest in observing such proceedings; and
 - Whether matters to be discussed at such proceedings ordinarily involve issues of broad public interest or the interests of persons beyond the parties.
7. Agencies should ~~consider adopting~~ processes for departing from or considering requests to depart from a presumption of open or closed proceedings in particular cases. Agencies should consider addressing the following topics in the procedural regulations described in Paragraph 1:
- How parties to a case can request that proceedings that are presumptively open to public observation be closed or that proceedings that are presumptively closed to public observation be open to particular individuals or the general public;
 - How non-parties to a case can request access, for themselves or the general

Commented [CA6]: Proposed Amendment from Council #1 (see related amendments at lines 10–17 and parallel amendments at lines 21, 48, 54, and 212)

Commented [CA7]: Proposed Amendment from Council #3



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- public, to proceedings that are presumptively closed to public observation;
- c. How parties and non-parties can respond or object to requests regarding public access made in subparagraphs (a) or (b);
- d. Under what circumstances adjudicators or other agency officials can, on their own motion, close proceedings that are presumptively open to public observation or open proceedings that are presumptively closed to public observation;
- e. Whether and how adjudicators or other agency officials must document and notify participants about decisions regarding public access; and
- f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to whom, and how they may do so.

Manner of Public Observation of Open Adjudicative Proceedings

8. When adjudicators conduct open proceedings in public hearing rooms, members of the public should have the opportunity to observe the proceedings from the rooms in which they are conducted, subject to reasonable security protocols, resource and space constraints, and concerns about disruptions.
9. Agencies should provide all or select members of the public, ~~such as family members or caregivers,~~ the opportunity to observe open adjudicative proceedings remotely. Agencies should provide remote access in a way that is appropriate for a particular proceeding, such as by providing a dial-in number to select members of the public, ~~such as family members or caregivers,~~ on request or by livestreaming audio or video of the proceedings to the general public online. Agencies should structure remote access in a way that avoids disruptions, such as by ensuring that public observers cannot unmute themselves or use chat, screen-sharing, document-annotation, file-sharing functions common in internet-based videoconferencing software. ~~Agencies should be aware that members of the public, including the press, may choose to record and disseminate audio or video transmissions in whole or in part regardless of the rules that may apply in physical hearing rooms.~~
10. Agencies should consider whether interested members of the public are likely to encounter any barriers to accessing open adjudicative proceedings and, if so, take steps to

Commented [CA8]: Proposed Amendment from Council #4 (see parallel amendment at lines 154–55):

As written, it is unclear to whom “select members of the public” refers. If “select members of the public” is intended to have the same meaning as in Paragraph 3, the Council recommends restating the appositive (“such as family members or caregivers”) that follows the phrase in that paragraph.

Commented [CA9]: Proposed Amendment from Council #4 (see parallel amendment at lines 151–52):

Commented [CA10]: Proposed Amendment from Council Amendment #5:

The Council presumes that this sentence is not intended to state that third-party recording is permissible, but rather only to state a predicative fact as to what members of the public may do when accessing proceedings remotely. If that’s the case, the sentence is not a recommendation, consistent with ACUS practice, should not appear as one. (If the Committee did intend to state that recording is permissible, it would ask the Committee to explain the legal basis of the statement.)



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remedy them. For example, measures may be needed to accommodate people with disabilities, people for whom it may be difficult to make arrangements to travel to locations where proceedings are conducted, and people who do not have access to electronic devices or private internet services necessary to observe proceedings remotely. Agencies may also need to adjust security protocols at the facilities where proceedings are conducted to facilitate in-person attendance while still accounting for reasonable security needs.

Advance Public Notice of Adjudicative Proceedings

11. Agencies should provide advance public notice of open adjudicative proceedings and consider whether to provide advance public notice of closed proceedings, so that the public is aware of such proceedings and can request access to them as specified in Paragraph 7(b). Agencies that determine that advance public notice would be beneficial should consider (a) the best places and publications for providing such notice, (b) the information provided in the notice, and (c) the timing of the notice. Agencies that regularly conduct open proceedings should also consider maintaining a schedule of and information about upcoming proceedings in an appropriate location on their websites.
12. To determine the best places and publications for providing advance public notice of adjudicative proceedings, agencies should consider their needs and available resources and the individuals, communities, and organizations that are likely to be interested in or affected by such proceedings. Places and publications where agencies might provide public notice of proceedings include:
 - a. *The Federal Register*;
 - b. A press release, digest, newsletter, or blog post published by the agency;
 - c. An agency events calendar;
 - d. Social media;
 - e. A newspaper or other media outlet that members of the public who may be interested in observing the proceeding are likely to monitor;
 - f. A physical location that potentially interested members of the public are likely to



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- 191 see (e.g., a bulletin board at a jobsite or agency office);
- 192 g. An email sent to persons who have subscribed to a mailing list or otherwise opted
- 193 to receive updates about a particular adjudication; and
- 194 h. A communication sent directly to members of the public, communities, and
- 195 organizations who may be interested in observing the proceeding.
- 196 13. Agencies should include the following information in any public notice for an open
- 197 adjudicative proceeding, as applicable:
- 198 a. The name and docket number or other identifying information for the proceeding;
- 199 b. The date and time of the proceeding;
- 200 c. The ways that members of the public can observe the proceeding, along with the
- 201 directions, if any, for registering or requesting access to the proceeding and, for
- 202 in-person observers, instructions for accessing the facility where the proceeding
- 203 will take place, including any security or public health protocols and disability
- 204 accommodations;
- 205 d. A brief summary of the proceeding's purpose; and
- 206 e. Contact information for a person who can answer questions about the proceeding.
- 207 14. Agencies should determine the appropriate timing for providing and updating public
- 208 notice of adjudicative proceedings given the nature of their programs and the proceeding
- 209 at issue. More advance notice may be warranted, for example, if significant public
- 210 interest in an open proceeding is likely and interested members of the public will need to
- 211 travel to observe it in person.

Public Access to Transcripts and Recordings of Adjudicative Proceedings

- 212 15. Consistent with applicable ~~constitutional and statutory legal~~ requirements ~~and the~~
- 213 ~~objectives identified in Paragraph 1~~, agencies should consider how they make transcripts
- 214 and recordings of adjudicative proceedings available to interested members of the public.
- 215 In addition to providing public access to such materials on their websites, an agency
- 216 might also, as appropriate:
- 217 a. Make transcripts and recordings available for public inspection in a reading room,

Commented [CA11]: Proposed Amendment from Council #1 (see related amendments at lines 10–17 and parallel amendments at lines 21, 48, 54, and 111–12)



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- 218 docket office, or other agency facility;
- 219 b. Make transcripts and recordings available for public inspection on another public
- 220 website, such as a public video sharing website; or
- 221 c. Provide, or arrange for court reporters working under contract with the
- 222 government to provide, copies of transcripts and recordings on request for a fee
- 223 that is no more than the actual cost of duplication, though the agency may charge
- 224 a reasonable, additional fee for expedited processing.
- 225 16. Agencies should take steps to redact any information that is protected by law or policy
- 226 from public disclosure before providing public access to transcripts and recordings.
- 227 17. Agencies should ensure that transcripts and recordings of open proceedings are available
- 228 for public inspection in a timely manner.



Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation | December 16, 2021

1 Agencies issue guidance documents to help explain their programs and policies,
2 announce their interpretation of laws, and communicate other important information to regulated
3 entities, regulatory beneficiaries, and the broader public.¹ The Administrative Conference has
4 issued several recent recommendations regarding guidance documents.² Among them was
5 Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, which encourages
6 agencies to facilitate public access to guidance documents on their websites.

7 Over time, a given guidance document may no longer reflect an agency’s position. An
8 agency may rescind the document in whole or in part by announcing that it no longer reflects the
9 agency’s position. Even without being rescinded in whole or in part, a guidance document may
10 be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it
11 may fall into disuse in whole or in part. The present Recommendation terms these documents
12 “inoperative guidance documents.”

¹ Guidance documents include what the Administrative Procedure Act calls “interpretive rules” and “general statements of policy.” 5 U.S.C. § 553(b). They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies. *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931, 38931 (Aug. 8, 2019).

² *See, e.g.*, Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).



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Some inoperative guidance documents will be of interest to the public because they disclose how an agency's legal interpretations have changed³ or how policies or programs have changed over time.⁴ But if these documents are not posted on an agency's website, they will be either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case of documents not published in the *Federal Register*, or not as accessible as they should be, in the case of documents that were noticed in the *Federal Register*.⁵

Three statutes require agencies to make some inoperative guidance documents publicly available. The Federal Records Act requires agencies to post on their websites materials that are of "general interest or use to the public."⁶ FOIA requires agencies to publish notices in the *Federal Register* when they have rescinded or partially rescinded guidance documents that are addressed to the public generally rather than to specific individuals or organizations.⁷ The E-Government Act requires agencies to publish these rescission and partial rescission notices on their websites.⁸ Many agencies have also issued regulations pertaining to the public availability of their inoperative guidance documents.

The Office of Management and Budget's 2007 *Final Bulletin for Agency Good Guidance Practices* imposes additional requirements on agencies relating to inoperative guidance documents. It directs all agencies other than independent regulatory agencies to post notices on their websites whenever they have rescinded or partially rescinded significant guidance documents and to keep those notices in place for a year. It also encourages agencies to stamp or

³ See Blake Emerson & Ronald Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* (May 28, 2019) (report to the Admin. Conf. of the U.S.).

⁴ See Nicholas R. Parrillo, *Agency Guidance Through Policy Statements: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

⁵ See Recommendation 2019-3, *supra* note 1.

⁶ See 44 U.S.C. § 3102(2).

⁷ See 5 U.S.C. § 552(a)(1); *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1375 (Fed. Cir. 2020).

⁸ See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).



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otherwise prominently identify as “superseded” those significant guidance documents that have become inoperative but which remain available for historical purposes.⁹

Recommendation 2019-3, though concerned primarily with operative guidance documents, makes several recommendations relating to the posting of inoperative guidance documents. In summary, it recommends that agencies (1) mark posted guidance documents to indicate whether they are current or were withdrawn or rescinded and (2) in the case of rescinded or withdrawn documents, note their rescission or withdrawal date and provide links to any successor documents.

Recommendation 2019-3 reserved the question, however, of which inoperative guidance documents agencies should publish online. This Recommendation takes up that issue, building on the principles Recommendation 2019-3 set forth for operative documents by extending them, as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop written procedures for publishing inoperative guidance documents, devise effective strategies for labeling and organizing these documents on their websites, and deploy other means of disseminating information about these documents.¹⁰ The Recommendation also encourages agencies to provide clear cross-references or links between inoperative guidance documents and any operative guidance documents replacing or modifying them.

This Recommendation, like Recommendation 2019-3, accounts for differences across agencies in terms of the number of guidance documents they issue, how they use guidance documents, and their resources and capacities for managing online access to these documents.¹¹

⁹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

¹⁰ Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019-3 to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019-3, ¶ 1; Paragraph 3 with Recommendation 2019-3, ¶¶ 4, 7, 9; Paragraph 4 with Recommendation 2019-3, ¶ 8; and Paragraph 6 with Recommendation 2019-3, ¶ 11.

¹¹ See Todd Rubin, Public Availability of Inoperative Agency Guidance Documents (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.); Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.).



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Accordingly, although it is likely that agencies following this Recommendation will make some of their inoperative guidance documents more readily available to the public, this Recommendation should not be understood as necessarily advising agencies to post the full universe of their inoperative guidance documents online.

This Recommendation is limited to guidance documents that become inoperative in the future. Agencies may, of course, choose to apply it retrospectively to existing inoperative guidance documents.

RECOMMENDATION

Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents

1. Each agency should develop and publish on its website written procedures governing the public availability of inoperative guidance documents and should consider doing the following in its procedures:
 - a. Explaining what it considers to be inoperative guidance documents for purposes of its procedures instituted under this Recommendation;
 - b. Identifying which one or more of the following kinds of inoperative guidance documents are covered by its procedures: rescinded guidance documents, partially rescinded guidance documents, superseded guidance documents, partially superseded guidance documents, or guidance documents that have fallen into disuse in whole or in part;
 - c. Identifying, within the kinds of inoperative guidance documents covered by its procedures, which categories of inoperative guidance documents will be published on its website and otherwise made publicly available, taking into consideration the categories articulated in Paragraph 2 below;
 - d. Explaining how it will include links or cross-references between any related inoperative and operative guidance documents;



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- 75 e. Specifying how long inoperative guidance documents will be retained on its
- 76 website;
- 77 f. Specifying whether some types of previously unpublished operative guidance
- 78 documents will be posted on its website and otherwise made publicly available
- 79 when they become inoperative and, if so, under what circumstances;
- 80 g. Providing for how inoperative guidance documents will be organized on its
- 81 website to facilitate searching and public access;
- 82 h. Identifying, as provided in Paragraph 4 below, what labels and explanations it will
- 83 use to communicate clearly the inoperative status of guidance documents; and
- 84 i. Indicating whether any or all of the procedures should be applied retroactively.

Determining Which Categories of Inoperative Guidance Documents to Publish Online and Otherwise Make Publicly Available

- 85 2. Each agency should consider publishing on its website and otherwise making publicly
- 86 available one or more of the following categories of inoperative guidance documents:
- 87 a. Inoperative guidance documents whose operative versions it made publicly
- 88 available;
- 89 b. Inoperative guidance documents that, if they were operative, would be made
- 90 publicly available under its current policies;
- 91 c. Inoperative guidance documents that have been replaced or amended by currently
- 92 operative guidance documents;
- 93 d. Inoperative guidance documents that expressed policies or legal interpretations
- 94 that remain relevant to understanding current law or policy;
- 95 e. Inoperative guidance documents that generated reliance interests when they were
- 96 operative;
- 97 f. Inoperative guidance documents that generate—or, when they were operative,
- 98 generated—numerous unique inquiries from the public;
- 99 g. Inoperative guidance documents that are—or, when operative, were—the subject
- 100 of attention in the general media or specialized publications relevant to the



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agency, or have been cited frequently in other agency documents, such as permits, licenses, grants, loans, contracts, or briefs;

- h. Inoperative guidance documents whose operative versions generated a high level of public participation when they were originally being formulated; and
- i. Inoperative guidance documents that, when operative or originally being formulated, had been published in the *Unified Agenda of Federal Regulatory and Deregulatory Actions* or were considered “significant guidance documents” under the Office of Management and Budget’s *Final Bulletin for Agency Good Guidance Practices*.

Organizing and Labeling Inoperative Guidance Documents Available Online

- 3. Each agency should organize its inoperative guidance documents on its website to make it easy for members of the public to find them and relate them to any successor guidance documents. The agency should consider one or more of the following approaches:
 - a. Assigning a unique guidance identification number to each inoperative guidance document, if this number had not already been assigned when the document was operative;
 - b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to displaying entries for inoperative guidance documents, with links to these documents;
 - c. Providing a search function that enables retrieval of inoperative guidance documents;
 - d. Using a method, such as a pull-down menu, that allows the public to view inoperative guidance documents and see that they are inoperative; and
 - e. Including links or notations within inoperative guidance documents, pointing to any successor operative guidance documents.
- 4. Each agency should label inoperative guidance documents on its website to ensure that the public can readily understand the inoperative status of those guidance documents. The agency should consider adopting one or more of the following methods for publicly



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labeling its guidance documents as inoperative and then using the selected method or methods consistently:

- a. Including a watermark that displays “rescinded,” “partially rescinded,” “superseded,” “partially superseded,” “not in use,” or similar terminology as appropriate across each page of an inoperative guidance document;
- b. Including words such as “rescinded,” “partially rescinded,” “superseded,” “partially superseded,” “not in use,” or similar terminology as appropriate within a table in which links to inoperative guidance documents appear;
- c. Using an appropriate method, including redline versions or lists of changes, to communicate changes made to a guidance document that has been partially rescinded or superseded;
- d. Including a prominent stamp at the top of an inoperative guidance document noting that the document is inoperative and indicating the date it became inoperative;
- e. Providing cross-references, using links or notations, from an inoperative guidance document to any successor versions of the guidance document, and vice versa; and
- f. Publishing a notice of rescission or partial rescission of a guidance document on the agency’s website and providing links to this notice in the inoperative guidance document.

Using Means in Addition to Agency Websites to Notify the Public When a Guidance Document Has Become Inoperative

5. At a minimum, an agency should notify the public that a guidance document has become inoperative in the same way that it notified the public that the operative version of the guidance document was issued or in the same way it would notify the public that an



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operative version of the guidance document has been issued under the agency's current policies.

6. An agency should consider using one or more of the following methods to notify the public when a guidance document has become inoperative:
 - a. Publishing this notification in the *Federal Register* even when not required to do so by law;
 - b. Sending this notification over an agency listserv or to a similar mailing list to which the public can subscribe;
 - c. Providing this notification during virtual meetings, in-person meetings, or webinars involving the public; and
 - d. Publishing this notification in a press release.
7. In disseminating notifications as indicated in Paragraph 6, agencies should consider including cross-references to any successor guidance documents.



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Public Availability of Inoperative Agency Guidance Documents

Committee on Regulation

Proposed Recommendation | December 16, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from a Conference member (with source shown in the margin).

1 Agencies issue guidance documents to help explain their programs and policies,
2 announce their interpretation of laws, and communicate other important information to regulated
3 entities, regulatory beneficiaries, and the broader public.¹ The Administrative Conference has
4 issued several recent recommendations regarding guidance documents.² Among them was
5 Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, which encourages
6 agencies to facilitate public access to guidance documents on their websites.

7 Over time, a given guidance document may no longer reflect an agency's position. An
8 agency may rescind the document in whole or in part by announcing that it no longer reflects the
9 agency's position. Even without being rescinded in whole or in part, a guidance document may
10 be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it

¹ Guidance documents include what the Administrative Procedure Act calls "interpretive rules" and "general statements of policy." 5 U.S.C. § 553(b). They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies. *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931, 38931 (Aug. 8, 2019).

² *See, e.g.*, Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).



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may fall into disuse in whole or in part. The present Recommendation terms these documents “inoperative guidance documents.”

Some inoperative guidance documents will be of interest to the public because they disclose how an agency’s legal interpretations have changed³ or how policies or programs have changed over time.⁴ But if these documents are not posted on an agency’s website, they will be either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case of documents not published in the *Federal Register*, or not as accessible as they should be, in the case of documents that were noticed in the *Federal Register*.⁵

Three statutes require agencies to make some inoperative guidance documents publicly available. The Federal Records Act requires agencies to post on their websites materials that are of “general interest or use to the public.”⁶ FOIA requires agencies to publish notices in the *Federal Register* when they have rescinded or partially rescinded guidance documents that are addressed to the public generally rather than to specific individuals or organizations.⁷ The E-Government Act requires agencies to publish these rescission and partial rescission notices on their websites.⁸ Many agencies have also issued regulations pertaining to the public availability of their inoperative guidance documents.

The Office of Management and Budget’s 2007 *Final Bulletin for Agency Good Guidance Practices* imposes additional requirements on agencies relating to inoperative guidance documents. It directs all agencies other than independent regulatory agencies to post notices on

³ See Blake Emerson & Ronald Levin, Agency Guidance Through Interpretive Rules: Research and Analysis (May 28, 2019) (report to the Admin. Conf. of the U.S.).

⁴ See Nicholas R. Parrillo, Agency Guidance Through Policy Statements: An Institutional Perspective (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

⁵ See Recommendation 2019-3, *supra* note 1.

⁶ See 44 U.S.C. § 3102(2).

⁷ See 5 U.S.C. § 552(a)(1); Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affairs, 981 F.3d 1360, 1375 (Fed. Cir. 2020).

⁸ See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).



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their websites whenever they have rescinded or partially rescinded significant guidance documents and to keep those notices in place for a year. It also encourages agencies to stamp or otherwise prominently identify as “superseded” those significant guidance documents that have become inoperative but which remain available for historical purposes.⁹

Recommendation 2019-3, though concerned primarily with operative guidance documents, makes several recommendations relating to the posting of inoperative guidance documents. In summary, it recommends that agencies (1) mark posted guidance documents to indicate whether they are current or were withdrawn or rescinded and (2) in the case of rescinded or withdrawn documents, note their rescission or withdrawal date and provide links to any successor documents.

Recommendation 2019-3 reserved the question, however, of which inoperative guidance documents agencies should publish online. This Recommendation takes up that issue, building on the principles Recommendation 2019-3 set forth for operative documents by extending them, as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop written procedures for publishing inoperative guidance documents, devise effective strategies for labeling and organizing these documents on their websites, and deploy other means of disseminating information about these documents.¹⁰ The Recommendation also encourages agencies to provide clear cross-references or links between inoperative guidance documents and any operative guidance documents replacing or modifying them.

This Recommendation, like Recommendation 2019-3, accounts for differences across agencies in terms of the number of guidance documents they issue, how they use guidance

⁹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

¹⁰ Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019-3 to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019-3, ¶ 1; Paragraph 3 with Recommendation 2019-3, ¶¶ 4, 7, 9; Paragraph 4 with Recommendation 2019-3, ¶ 8; and Paragraph 6 with Recommendation 2019-3, ¶ 11.



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documents, and their resources and capacities for managing online access to these documents.¹¹ Accordingly, although it is likely that agencies following this Recommendation will make some of their inoperative guidance documents more readily available to the public, this Recommendation should not be understood as necessarily advising agencies to post the full universe of their inoperative guidance documents online.

This Recommendation is limited to guidance documents that become inoperative in the future. Agencies may, of course, choose to apply it retrospectively¹² to existing inoperative guidance documents.

RECOMMENDATION

Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents Prospectively

1. Each agency should develop and publish on its website written procedures governing the public availability of inoperative guidance documents and should consider doing the following in its procedures:
 - a. Explaining what it considers to be inoperative guidance documents for purposes of its procedures instituted under this Recommendation;
 - b. Identifying which one or more of the following kinds of inoperative guidance documents are covered by its procedures: rescinded guidance documents, partially rescinded guidance documents, superseded guidance documents, partially superseded guidance documents, or guidance documents that have fallen into disuse in whole or in part;
 - c. Identifying, within the kinds of inoperative guidance documents covered by its procedures, which categories of inoperative guidance documents will be

Commented [CMA1]: Proposed Amendment from Government Member Christina E. McDonald #1:

The preamble states, "This Recommendation is limited to guidance documents that become inoperative in the future," so clarifying language would be helpful in the actual recommendation that this is prospective (with the option of course to apply retrospectively). There is no strong preference on the placement of the word "prospectively," just somewhere within the title or Paragraph 1.

¹¹ See Todd Rubin, Public Availability of Inoperative Agency Guidance Documents (Nov. 22, 2021) (report to the Admin. Conf. of the U.S.); Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.).



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- published on its website and otherwise made publicly available, taking into consideration the categories articulated in Paragraph 2 below;
- d. Explaining how it will include links or cross-references between any related inoperative and operative guidance documents;
 - e. Specifying how long inoperative guidance documents will be retained on its website;
 - f. Specifying whether some types of previously unpublished operative guidance documents will be posted on its website and otherwise made publicly available when they become inoperative and, if so, under what circumstances;
 - g. Providing for how inoperative guidance documents will be organized on its website to facilitate searching and public access;
 - h. Identifying, as provided in Paragraph 4 below, what labels and explanations it will use to communicate clearly the inoperative status of guidance documents; and
 - i. Indicating whether any **or all** of the procedures should be applied retroactively.

Determining Which Categories of Inoperative Guidance Documents to Publish Online and Otherwise Make Publicly Available

2. Each agency should consider publishing on its website and otherwise making publicly available one or more of the following categories of inoperative guidance documents:
- a. Inoperative guidance documents whose operative versions it made publicly available **and whose continued availability is of interest or use to the public;**
 - b. Inoperative guidance documents that, if they were operative, would be made publicly available under its current policies;
 - c. Inoperative guidance documents that have been replaced or amended by currently operative guidance documents;
 - d. Inoperative guidance documents that expressed policies or legal interpretations that remain relevant to understanding current law or policy;
 - e. Inoperative guidance documents that generated reliance interests when they were operative;

Commented [CMA2]: Proposed Amendment from Government Member Christina E. McDonald #2:

Our concern is the overwhelming task of keeping older versions of all inoperative documents online, especially documents that would not be of interest or benefit to the public. There is a cost to maintaining these documents online, and a broad reading of this section would unfairly burden agencies with a large catalogue of inoperative documents that have little to no benefit to anyone. Moreover, having and maintaining a large repository of inoperative guidance documents could lead to confusion and reliance on outdated guidance. Therefore, leaving more room for each agency to decide would strengthen this recommendation.



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- f. Inoperative guidance documents that generate—or, when they were operative, generated—numerous unique inquiries from the public;
- g. Inoperative guidance documents that are—or, when operative, were—the subject of attention in the general media or specialized publications relevant to the agency, or have been cited frequently in other agency documents, such as permits, licenses, grants, loans, contracts, or briefs;
- h. Inoperative guidance documents **that, when originally being formulated, whose operative versions** generated a high level of public participation **when they were originally being formulated**; and
- i. Inoperative guidance documents that, when operative or originally being formulated, had been published in the *Unified Agenda of Federal Regulatory and Deregulatory Actions* or were considered “significant guidance documents” under the Office of Management and Budget’s *Final Bulletin for Agency Good Guidance Practices*.

Organizing and Labeling Inoperative Guidance Documents Available Online

- 3. Each agency should organize its inoperative guidance documents on its website to make it easy for members of the public to find them and relate them to any successor guidance documents. The agency should consider one or more of the following approaches:
 - a. Assigning a unique guidance identification number to each inoperative guidance document, if this number had not already been assigned when the document was operative;
 - b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to displaying entries for inoperative guidance documents, with links to these documents;
 - c. Providing a search function that enables retrieval of inoperative guidance documents;
 - d. Using a method, such as a pull-down menu, that allows the public to view inoperative guidance documents and see that they are inoperative; and



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- e. Including links or notations within inoperative guidance documents, pointing to any successor operative guidance documents.
- 4. Each agency should label inoperative guidance documents on its website to ensure that the public can readily understand the inoperative status of those guidance documents. The agency should consider adopting one or more of the following methods for publicly labeling its guidance documents as inoperative and then using the selected method or methods consistently:
 - a. Including a watermark that displays “rescinded,” “partially rescinded,” “superseded,” “partially superseded,” “not in use,” or similar terminology as appropriate across each page of an inoperative guidance document;
 - b. Including words such as “rescinded,” “partially rescinded,” “superseded,” “partially superseded,” “not in use,” or similar terminology as appropriate within a table in which links to inoperative guidance documents appear;
 - c. Using an appropriate method, including redline versions or lists of changes, to communicate changes made to a guidance document that has been partially rescinded or superseded;
 - d. Including a prominent stamp at the top of an inoperative guidance document noting that the document is inoperative and indicating the date it became inoperative;
 - e. Providing cross-references, using links or notations, from an inoperative guidance document to any successor versions of the guidance document, and vice versa; and
 - f. Publishing a notice of rescission or partial rescission of a guidance document on the agency’s website and providing links to this notice in the inoperative guidance document.



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Using Means in Addition to Agency Websites to Notify the Public When a Guidance Document Has Become Inoperative

5. At a minimum, an agency should notify the public that a guidance document has become inoperative in the same way that it notified the public that the operative version of the guidance document was issued or in the same way it would notify the public that an operative version of the guidance document has been issued under the agency's current policies.
6. An agency should consider using one or more of the following methods to notify the public when a guidance document has become inoperative:
 - a. Publishing this notification in the *Federal Register* even when not required to do so by law;
 - b. Sending this notification over an agency listserv or to a similar mailing list to which the public can subscribe;
 - c. Providing this notification during virtual meetings, in-person meetings, or webinars involving the public; and
 - d. Publishing this notification in a press release.
7. In disseminating notifications as indicated in Paragraph 6, agencies should consider including cross-references to any successor guidance documents.



Technical Reform of the Congressional Review Act

Committee on Rulemaking

Proposed Recommendation | December 16, 2021

1 The Congressional Review Act (CRA)¹ allows Congress to enact joint resolutions
2 overturning rules issued by federal agencies. It also establishes special, fast-track procedures
3 governing such resolutions. This Recommendation aims to address certain technical flaws in the
4 Act and how it is presently administered.

The Hand-Delivery Requirement

5 The CRA provides that, before a rule can take effect, an agency must submit a report (an
6 801(a) report) to each house of Congress and the Comptroller General, who heads the
7 Government Accountability Office (GAO). Receipt of the 801(a) report by each house of
8 Congress and the Comptroller General also triggers the CRA's special, fast-track procedures.

9 The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the
10 Comptroller General. Congressional rules, however, currently require that 801(a) reports be
11 hand-delivered to both chambers of Congress. Although the House allows Members to
12 electronically submit certain legislative documents and the Comptroller General permits agencies
13 to electronically submit 801(a) reports, electronic submission is not generally regarded by
14 Congress as an acceptable means of submitting 801(a) reports to Congress.

15 The hand-delivery requirement has been the subject of persistent criticism on the grounds
16 that it is inefficient and outdated. Recent events have also shown that it is sometimes
17 impracticable. For example, staffing disruptions related to the COVID-19 pandemic have, in

¹ 5 U.S.C. §§ 801–08.



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some instances, meant that agencies had difficulty delivering 801(a) reports by hand and congressional officials have not been present in the Capitol to receive 801(a) reports via hand-delivery.

Time Periods for Introducing and Acting on Resolutions Under the CRA

Another source of persistent criticism of the CRA concerns the time periods during which Members of Congress may introduce and act on joint resolutions overturning agencies' rules. Under the CRA, Congress's receipt of an 801(a) report begins a period of 60 days, excluding days when either chamber adjourns for more than three days, during which any Member of either chamber may introduce a joint resolution disapproving the rule.² Only rules submitted during this period, sometimes called the "introduction period," are eligible for the CRA's special, fast-track procedures.

Calculating the introduction period can be confusing because it runs only on "days of continuous session"—that is, on every calendar day *except* those falling in periods when, pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a practical matter, there is seldom a difference between 60 days of continuous session and 60 calendar days because recent Congresses have made regular use of *pro forma* sessions to avoid adjournments of more than three days. Nevertheless, having to calculate the introduction period according to days of continuous session rather than calendar days can mislead people unfamiliar with the concept of days of continuous session or with recent Congresses' uses of *pro forma* sessions. Moreover, because modern Congresses invoke *pro forma* sessions in a way that negates almost any practical difference between days of continuous session and calendar days, the CRA's use of days of continuous session to calculate the introduction period accomplishes little beyond complicating the process of ascertaining the period's end date.

The introduction period is not the only complicated timing provision in the CRA. Another—sometimes called the "lookback period"—provides that if, within 60 days of session in

² *Id.* § 802(a).



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the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns its annual session *sine die* (i.e., for an indefinite period), the periods to submit and act on a disapproval resolution “reset” in their entirety in the next session of Congress.³ In that next session, the reset period begins on the 15th day of the session in the Senate and the 15th legislative day in the House. The lookback period thus ensures that Congress has the full periods contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a session of Congress.

The lookback period is anomalous and difficult to ascertain for several reasons. Whereas most of the time periods set forth in the CRA are calculated in calendar days, the lookback period is calculated using Senate session days and House legislative days—terms of art with which most people are unfamiliar.⁴ The lookback period is also unpredictable because House legislative and Senate session days do not always correspond to each other, and the chambers regularly modify their anticipated calendar of session or legislative days, often with little advance notice. In addition, using legislative and session days to calculate the lookback period means interested Members of Congress can strategically lengthen or shorten the period, either by having legislative or session days extend for multiple calendar days or cramming several legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most time periods under the CRA are calculated prospectively—that is, by counting forward from an established starting date—the lookback period is calculated retrospectively—that is, by counting backward from an end date that is not known until Congress adjourns *sine die*. The lookback period’s retrospective quality makes it effectively impossible to calculate in real time because the date on which the lookback period begins is only knowable once the period has closed. For those and other reasons, the public, Members of Congress, congressional staff, and agencies sometimes

³ *Id.* § 801(d)(1).

⁴ A Senate session day is “[a] calendar day on which [the Senate] convenes and then adjourns or recesses until a later calendar day,” while a House legislative day commences when the House convenes and continues until the House adjourns. See RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RSCH. SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 2, 6 (2016), available at <https://crsreports.congress.gov/product/pdf/R/R42977>.



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struggle to anticipate when the CRA’s lookback period will commence, or determine when it did commence, during a given session of Congress.⁵

Complicating matters still further, the CRA’s key dates do not necessarily align in ways that make sense. For instance, the CRA expressly provides that the introduction and lookback periods commence when an 801(a) report is submitted to Congress. But other, related CRA time periods—such as the periods for discharging a joint resolution from committee (the discharge period) and for fast-tracking a rule through the Senate (the Senate action period)—commence running only after Congress receives the report *and* the rule is published in the *Federal Register*. This can lead to anomalous situations. Members of Congress might, for instance, timely introduce joint resolutions of disapproval under the CRA and yet be unable to avail themselves of the CRA’s fast-track procedures.

At present, problems with synchronizing related CRA time windows are addressed primarily through interpretations from the Senate and House Parliamentarians. For example, the Senate Parliamentarian has interpreted the lookback and introduction periods to commence only after the 801(a) report has been submitted to Congress *and* the rule has been published in the *Federal Register*, thereby harmonizing the starting dates for those periods with the starting dates for the discharge and Senate action periods.

But relying on the Parliamentarians’ interpretations creates its own problems. Chief among them is that the interpretations are not always easily accessible by the public. Although some of the Parliamentarians’ interpretations are publicly available, many are not. Indeed, the formal rulings of the Senate Parliamentarian have not been published in decades. In the case of

⁵ In recent years, the lookback period has tended to commence between mid-July and early August, with the precise date varying from year to year. *See* Jesse M. Cross, Technical Reform of the Congressional Review Act 35 (Oct. 8, 2021) (draft report to the Admin. Conf. of the U.S.). In setting a commencement date for the lookback period, Congress may wish to consider the relationship between the CRA and what are sometimes called midnight rules (that is, rules published in the final months of an administration). *See* Admin. Conf. of the U.S., Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47802 (Aug. 10, 2012).



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86 the interpretations that are collected and published, moreover, most members of the public are
87 either unaware of the interpretations' existence or unsure how to access them.

Initiating CRA Review of Actions for Which Agencies Do Not Submit 801(a) Reports

88 Still another criticism of the CRA concerns what Congress should do to enable CRA
89 review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does
90 not say what to do in those situations, even though studies show they arise frequently.

91 Absent statutory text addressing the subject, Congress has adopted a process through
92 which it initiates review of such agency actions by requesting an opinion from the GAO. That
93 process begins when Members of Congress or committees request a GAO opinion on whether an
94 agency action qualifies as a “rule” under the CRA. If GAO concludes that it does, a Member or a
95 committee provides for publication of the GAO opinion in the *Congressional Record*.
96 Publication in the *Congressional Record* is then deemed to be the date that triggers the time
97 periods for CRA review of the agency action.

98 Although that process has worked tolerably well as a response to the problem of
99 unreported rules, it lacks a clear basis in the CRA's text. There are also aspects of it that warrant
100 revisiting. For example, there is no time limit for using the current, de facto procedure, meaning
101 Congress might use it to subject a decades-old action to CRA review.

102 This Recommendation provides targeted, technical reforms to address many of the
103 criticisms just identified—including criticisms of the hand-delivery requirement, criticisms
104 prompted by the confusion surrounding key dates under CRA, and criticisms of the process for
105 initiating CRA review of agency actions for which agencies do not submit 801(a) reports.



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RECOMMENDATION

Requiring Electronic Submission of Reports Required by 5 U.S.C. § 801(a)(1)(A)

1. Congress should amend 5 U.S.C. § 801(a)(1)(A) to provide that the reports required by that provision (801(a) reports) be submitted to Congress and the Government Accountability Office (GAO) electronically rather than by hard copy.
2. In the event Congress does not enact the amendment described in Paragraph 1, both houses of Congress should modify their rules or policies to require electronic submission of 801(a) reports.
3. In the event that Congress, in some manner, mandates electronic submission of 801(a) reports, it should establish procedures governing how agencies may electronically submit 801(a) reports.

Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5 U.S.C. §§ 801 and 802.

4. Congress should simplify 5 U.S.C. § 801(d)(1) by setting a fixed month and day after which, each year, rules submitted to Congress under the Congressional Review Act (CRA) will be subject to the CRA's review process during the following session of Congress.
5. Congress should amend 5 U.S.C. § 802(a), which establishes the period during which joint resolutions of disapproval under the CRA may be introduced, to either:
 - a. Eliminate the requirement that joint resolutions be introduced during a particular period;
 - b. Align the dates on which the period commences and ends with the period during which the Senate may act on a proposed joint resolution of disapproval submitted under the CRA; or
 - c. Align the date on which the period commences with the period during which the Senate may so act and provide that such period ends a fixed number of calendar



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days from such commencement.

6. Congress should review and, where appropriate, enact Parliamentary interpretations that bear on calculating deadlines under the CRA, either as statutory law or as formal rules of the houses. If Congress does not enact those interpretations into statutory law, it should ensure that they are published in a manner that is accessible to the public.

Initiating Review of Agency Actions for which Agencies Do Not Submit 801(a) Reports

7. If Congress intends to continue its current practice for initiating congressional review under the CRA of agency rules for which agencies have not submitted 801(a) reports, it should provide a transparent mechanism for doing so. To that end, Congress should amend Chapter 8 of Title 5 of the *United States Code* to enact the process it currently relies on to initiate CRA review in such situations, whereby:
 - a. Any Member of Congress or committee may request the opinion of the GAO on whether an agency action qualifies as a “rule” under the CRA;
 - b. After soliciting views from the agency, GAO responds by issuing an opinion as to whether the agency action in question qualifies as a “rule” under the CRA;
 - c. If GAO concludes that the action amounts to a rule under the CRA, any Member of Congress or committee may provide for publication of the GAO opinion in the *Congressional Record*; and
 - d. Publication of the GAO opinion in the *Congressional Record* is deemed to be the date that triggers the time periods for CRA review of the agency rule.
8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should impose a “statute of limitations” on the eligibility of rules for review under such procedure.
9. Congress should consider imposing a deadline on GAO for issuing requested opinions on whether a particular agency action is a rule for purposes of the CRA.



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Technical Reform of the Congressional Review

Committee on Rulemaking

Proposed Recommendation | December 16, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 The Congressional Review Act (CRA)¹ allows Congress to enact joint resolutions
2 overturning rules issued by federal agencies. It also establishes special, fast-track procedures
3 governing such resolutions. This Recommendation aims to address certain technical flaws in the
4 Act and how it is presently administered.

The Hand-Delivery Requirement

5 The CRA provides that, before a rule can take effect, an agency must submit a report (an
6 801(a) report) to each house of Congress and the Comptroller General, who heads the
7 Government Accountability Office (GAO). Receipt of the 801(a) report by each house of
8 Congress and the Comptroller General also triggers the CRA's special, fast-track procedures.

9 The CRA says nothing about how agencies must deliver 801(a) reports to Congress or the
10 Comptroller General. Congressional rules, however, currently require that 801(a) reports be
11 hand-delivered to both chambers of Congress. Although the House allows Members to
12 electronically submit certain legislative documents and the Comptroller General permits agencies

¹ 5 U.S.C. §§ 801–08.



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13 to electronically submit 801(a) reports, electronic submission is not generally regarded by
14 Congress as an acceptable means of submitting 801(a) reports to Congress.

15 The hand-delivery requirement has been the subject of persistent criticism on the grounds
16 that it is inefficient and outdated and results in exorbitant costs to federal agencies. Recent events
17 have also shown that it is sometimes impracticable. For example, staffing disruptions related to
18 the COVID-19 pandemic have, in some instances, meant that agencies had difficulty delivering
19 801(a) reports by hand and congressional officials have not been present in the Capitol to receive
20 801(a) reports via hand-delivery.

Commented [CMA1]: Proposed Amendment from
Government Member Helen Serassio

Time Periods for Introducing and Acting on Resolutions Under the CRA

21 Another source of persistent criticism of the CRA concerns the time periods during which
22 Members of Congress may introduce and act on joint resolutions overturning agencies' rules.
23 Under the CRA, Congress's receipt of an 801(a) report begins a period of 60 days, excluding
24 days when either chamber adjourns for more than three days, during which any Member of either
25 chamber may introduce a joint resolution disapproving the rule.² Only rules submitted during this
26 period, sometimes called the "introduction period," are eligible for the CRA's special, fast-track
27 procedures.

28 Calculating the introduction period can be confusing because it runs only on "days of
29 continuous session"—that is, on every calendar day *except* those falling in periods when,
30 pursuant to a concurrent resolution, at least one chamber adjourns for more than three days. As a
31 practical matter, there is seldom a difference between 60 days of continuous session and 60
32 calendar days because recent Congresses have made regular use of *pro forma* sessions to avoid
33 adjournments of more than three days. Nevertheless, having to calculate the introduction period
34 according to days of continuous session rather than calendar days can mislead people unfamiliar
35 with the concept of days of continuous session or with recent Congresses' uses of *pro forma*

² *Id.* § 802(a).



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36 sessions. Moreover, because modern Congresses invoke *pro forma* sessions in a way that negates
37 almost any practical difference between days of continuous session and calendar days, the
38 CRA’s use of days of continuous session to calculate the introduction period accomplishes little
39 beyond complicating the process of ascertaining the period’s end date.

40 The introduction period is not the only complicated timing provision in the CRA.
41 Another—sometimes called the “lookback period”—provides that if, within 60 days of session in
42 the Senate or 60 legislative days in the House after Congress receives a rule, Congress adjourns
43 its annual session *sine die* (i.e., for an indefinite period), the periods to submit and act on a
44 disapproval resolution “reset” in their entirety in the next session of Congress.³ In that next
45 session, the reset period begins on the 15th day of the session in the Senate and the 15th
46 legislative day in the House. The lookback period thus ensures that Congress has the full periods
47 contemplated by the CRA to disapprove a rule, even if the rule is submitted near the end of a
48 session of Congress.

49 The lookback period is anomalous and difficult to ascertain for several reasons. Whereas
50 most of the time periods set forth in the CRA are calculated in calendar days, the lookback
51 period is calculated using Senate session days and House legislative days—terms of art with
52 which most people are unfamiliar.⁴ The lookback period is also unpredictable because House
53 legislative and Senate session days do not always correspond to each other, and the chambers
54 regularly modify their anticipated calendar of session or legislative days, often with little
55 advance notice. In addition, using legislative and session days to calculate the lookback period
56 means interested Members of Congress can strategically lengthen or shorten the period, either by
57 having legislative or session days extend for multiple calendar days or cramming several
58 legislative or session days into a single calendar day. Perhaps most troublesome: Whereas most

³ *Id.* § 801(d)(1).

⁴ A Senate session day is “[a] calendar day on which [the Senate] convenes and then adjourns or recesses until a later calendar day,” while a House legislative day commences when the House convenes and continues until the House adjourns. See RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RSCH. SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 2, 6 (2016), available at <https://crsreports.congress.gov/product/pdf/R/R42977>.



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time periods under the CRA are calculated prospectively—that is, by counting forward from an established starting date—the lookback period is calculated retrospectively—that is, by counting backward from an end date that is not known until Congress adjourns *sine die*. The lookback period’s retrospective quality makes it effectively impossible to calculate in real time because the date on which the lookback period begins is only knowable once the period has closed. For those and other reasons, the public, Members of Congress, congressional staff, and agencies sometimes struggle to anticipate when the CRA’s lookback period will commence, or determine when it did commence, during a given session of Congress.⁵

Complicating matters still further, the CRA’s key dates do not necessarily align in ways that make sense. For instance, the CRA expressly provides that the introduction and lookback periods commence when an 801(a) report is submitted to Congress. But other, related CRA time periods—such as the periods for discharging a joint resolution from committee (the discharge period) and for fast-tracking a rule through the Senate (the Senate action period)—commence running only after Congress receives the report *and* the rule is published in the *Federal Register*. This can lead to anomalous situations. Members of Congress might, for instance, timely introduce joint resolutions of disapproval under the CRA and yet be unable to avail themselves of the CRA’s fast-track procedures.

At present, problems with synchronizing related CRA time windows are addressed primarily through interpretations from the Senate and House Parliamentarians. For example, the Senate Parliamentarian has interpreted the lookback and introduction periods to commence only after the 801(a) report has been submitted to Congress *and* the rule has been published in the

⁵ In recent years, the lookback period has tended to commence between mid-July and early August, with the precise date varying from year to year. See Jesse M. Cross, Technical Reform of the Congressional Review Act 35 (Oct. 8, 2021) (draft report to the Admin. Conf. of the U.S.). In setting a commencement date for the lookback period, Congress may wish to consider the relationship between the CRA and what are sometimes called midnight rules (that is, rules published in the final months of an administration). See Admin. Conf. of the U.S., Recommendation 2012-2, *Midnight Rules*, 77 Fed. Reg. 47802 (Aug. 10, 2012).



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80 *Federal Register*, thereby harmonizing the starting dates for those periods with the starting dates
81 for the discharge and Senate action periods.

82 But relying on the Parliamentarians' interpretations creates its own problems. Chief
83 among them is that the interpretations are not always easily accessible by the public. Although
84 some of the Parliamentarians' interpretations are publicly available, many are not. Indeed, the
85 formal rulings of the Senate Parliamentarian have not been published in decades. In the case of
86 the interpretations that are collected and published, moreover, most members of the public are
87 either unaware of the interpretations' existence or unsure how to access them.

Initiating CRA Review of Actions for Which Agencies Do Not Submit 801(a) Reports

88 Still another criticism of the CRA concerns what Congress should do to enable CRA
89 review of agency actions for which agencies do not submit 801(a) reports. The CRA itself does
90 not say what to do in those situations, even though studies show they arise frequently.

91 Absent statutory text addressing the subject, Congress has adopted a process through
92 which it initiates review of such agency actions by requesting an opinion from the GAO. That
93 process begins when Members of Congress or committees request a GAO opinion on whether an
94 agency action qualifies as a "rule" under the CRA. If GAO concludes that it does, a Member or a
95 committee provides for publication of the GAO opinion in the *Congressional Record*.
96 Publication in the *Congressional Record* is then deemed to be the date that triggers the time
97 periods for CRA review of the agency action.

98 Although that process has worked tolerably well as a response to the problem of
99 unreported rules, it lacks a clear basis in the CRA's text. There are also aspects of it that warrant
100 revisiting. For example, there is no time limit for using the current, de facto procedure, meaning
101 Congress might use it to subject a decades-old action to CRA review.



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* * *

102 This Recommendation provides targeted, technical reforms to address many of the
103 criticisms just identified—including criticisms of the hand-delivery requirement, criticisms
104 prompted by the confusion surrounding key dates under CRA, and criticisms of the process for
105 initiating CRA review of agency actions for which agencies do not submit 801(a) reports.

RECOMMENDATION

Requiring Electronic Submission of Reports Required by 5 U.S.C. § 801(a)(1)(A)

- 106 1. Congress should amend 5 U.S.C. § 801(a)(1)(A) to provide that the reports required by
107 that provision (801(a) reports) be submitted to Congress and the Government
108 Accountability Office (GAO) electronically rather than by hard copy.
- 109 2. In the event Congress does not enact the amendment described in Paragraph 1, both
110 houses of Congress should modify their rules or policies to require electronic submission
111 of 801(a) reports.
- 112 3. In the event that Congress, in some manner, mandates electronic submission of 801(a)
113 reports, it should establish procedures governing how agencies may electronically submit
114 801(a) reports.

Simplifying and Clarifying the Procedures for Determining Relevant Dates Under 5 U.S.C. §§ 801 and 802.

- 115 4. Congress should simplify 5 U.S.C. § 801(d)(1) by setting a fixed month and day after
116 which, each year, rules submitted to Congress under the Congressional Review Act
117 (CRA) will be subject to the CRA's review process during the following session of
118 Congress.
- 119 5. Congress should amend 5 U.S.C. § 802(a), which establishes the period during which

Commented [CA2]: Comment from Council:

The Council requests clarification from the Committee as to the following points:

- (1) Why did the Committee decide that electronic filing should be mandatory rather than permissive?
- (2) Are 801(a) reports publicly accessible? If so, how? Would electronic filing make the reports publicly accessible (or more easily so)?



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joint resolutions of disapproval under the CRA may be introduced, to either:

- a. Eliminate the requirement that joint resolutions be introduced during a particular period;
 - b. Align the dates on which the period commences and ends with the period during which the Senate may act on a proposed joint resolution of disapproval submitted under the CRA; or
 - c. Align the date on which the period commences with the period during which the Senate may so act and provide that such period ends a fixed number of calendar days from such commencement.
6. Congress should review and, where appropriate, enact Parliamentary interpretations that bear on calculating deadlines under the CRA, either as statutory law or as formal rules of the houses. If Congress does not enact those interpretations into statutory law, it should ensure that they are published in a manner that is accessible to the public.

Initiating Review of Agency Actions for which Agencies Do Not Submit 801(a) Reports

7. If Congress ~~intends to continue~~ its current practice for initiating congressional review under the CRA of agency rules for which agencies have not submitted 801(a) reports, it should provide a transparent mechanism for doing so. To that end, Congress should amend Chapter 8 of Title 5 of the *United States Code* to enact the process it currently relies on to initiate CRA review in such situations, whereby:
- a. Any Member of Congress or committee may request the opinion of the GAO on whether an agency action qualifies as a “rule” under the CRA;
 - b. After soliciting views from the agency, GAO responds by issuing an opinion as to whether the agency action in question qualifies as a “rule” under the CRA;
 - c. If GAO concludes that the action amounts to a rule under the CRA, any Member of Congress or committee may provide for publication of the GAO opinion in the *Congressional Record*; and

Commented [CMA3]: Proposed Amendment from Senior Fellow Alan B. Morrison:

“I would propose that the recommendation as to GAO be changed to eliminate any recommendation that it have a determinative role in the triggering of the Act.” For a more detailed explanation, see Prof. Morrison’s Comment on the project’s webpage.



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- 145 d. Publication of the GAO opinion in the *Congressional Record* is deemed to be the
146 date that triggers the time periods for CRA review of the agency rule.
- 147 8. If Congress amends the CRA to enact the procedure described in Paragraph 7, it should
148 impose a “statute of limitations” on the eligibility of rules for review under such
149 procedure.
- 150 9. Congress should consider imposing a deadline on GAO for issuing requested opinions on
151 whether a particular agency action is a rule for purposes of the CRA.



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Regulation of Representatives in Agency Adjudicative Proceedings

Ad Hoc Committee

Proposed Recommendation | December 16, 2021

Commented [OC11]: The Committee voted to replace the original title of this Recommendation (*Regulation of Representatives in Agency Proceedings*).

1 Many agencies have adopted rules governing the participation and conduct of attorneys
2 and non-attorneys who represent parties in adjudicative proceedings. These rules may address a
3 wide array of topics, including who can represent parties in adjudications, how representatives
4 must conduct themselves, and how the agency enforces rules of conduct.¹ Some agencies have
5 drafted their own rules. Others have adopted rules developed by state bar associations or the
6 American Bar Association's (ABA) *Model Rules of Professional Conduct*. Agencies provide
7 public access to their rules in different ways, including publishing them in the *Federal Register*
8 and *Code of Federal Regulations* and posting them on their websites. Some agencies have
9 provided explanatory materials to help representatives, parties, and the public understand how
10 the rules operate.

11 Agency authority to set qualifications for who may serve as a representative depends on
12 whether the potential representative is an attorney or non-attorney. For attorneys, the generally
13 applicable Agency Practice Act provides, with some exceptions, that "any individual who is a
14 member in good standing of the bar of the highest court of a State may represent a person before
15 an agency,"² though some statutes authorize agencies to impose additional qualification
16 requirements. Agencies generally have greater discretion under the Administrative Procedure
17 Act and agency- or program-specific statutes to determine whether persons who are not attorneys

¹ See George M. Cohen, Regulation of Representatives in Agency Proceedings, (Oct. 28, 2021) (draft report to the Admin. Conf. of the U.S.).

² 5 U.S.C. § 500(b).



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may act as representatives and, if they may, to establish the qualifications for doing so.

As a general matter, agencies have legal authority to establish rules governing the conduct of representatives and to take actions against representatives found to have violated such rules.³ Courts have consistently found such authority inherent in agencies' general rulemaking power or their power to protect the integrity of their processes.⁴ Agencies' disciplinary authority is not limitless, however, and agencies must determine what their governing statutes allow.

Agencies that adopt rules governing representatives will need to make a number of decisions as they decide the type of rules to adopt and how they will apply those rules. They must determine whether the rules will apply only to attorney representatives or will also apply to other representatives. They must decide whether to borrow language from rules drafted by other entities (state bars, ABA) or to draft their own rules. They must determine the particular conduct that the rules will regulate and whether to apply the same rules to attorneys and non-attorneys. And if they decide to adopt rules governing who may practice before the agency, they must ensure that they comply with the Agency Practice Act for rules applied to attorneys and determine the qualification standards, if any, they will establish for non-attorneys.

Once agencies have decided to adopt rules, they also must determine how to enforce those rules. Agencies may enforce rules in various ways, ranging from reminders or warnings to more serious actions, including disqualifying a representative from appearing in the current adjudication or future adjudications or imposing a monetary penalty. Agencies must satisfy themselves that they have the legal authority to undertake any such actions. Agencies also must determine whether to implement a program for reciprocal discipline, which involves imposing discipline on a representative found to have engaged in misconduct by another jurisdiction, or for referral procedures, which involve reporting attorneys' misconduct to another jurisdiction for

³ See, e.g., 5 U.S.C. § 301.

⁴ See, e.g., *Checkovsky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986); *Polydoroff v. ICC*, 773 F.2d 372, 374 (D.C. Cir. 1985); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 580–82 (2d Cir. 1979); *Koden v. U.S. DOJ*, 564 F.2d 228, 233 (7th Cir. 1977).



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purposes of taking possible disciplinary action.

Agencies that have adopted rules must ensure that representatives, parties, and the public can easily access the rules. Agencies also must decide whether to provide additional explanatory materials and, if so, ensure that those are also easily accessible.

This Recommendation recognizes that agency adjudicative proceedings vary widely in their purpose, complexity, and governing law. Some processes are trial-like; others are informal. Some are adversarial; others are non-adversarial. Given the extensive variation in agencies' needs and available resources, this Recommendation focuses primarily on setting forth the various options agencies should consider in deciding whether to adopt rules and deciding on the content of those rules. It takes no position on whether agencies should allow non-attorney representatives. For agencies that decide to adopt rules for attorneys and, if they elect to do so, for non-attorneys, the Recommendation offers best practices for seeking to ensure that those rules are disseminated widely and that representatives, parties, and the public can understand the rules and how agencies go about enforcing them.

Although the Recommendation does not endorse harmonization of rules for its own sake, it does urge agencies to consider whether achieving greater uniformity among different adjudicative components within the agency or even across adjudicative components of multiple agencies might prove valuable for representatives who practice before a variety of components or agencies.⁵ It also recommends that the Administrative Conference's Office of the Chairman consider preparing model rules that agencies can use when drafting their own rules.

⁵ Implicit in this Recommendation is the understanding that an attorney will not be placed in a position in which the attorney must act in contravention with rules of conduct of the state in which the attorney is licensed or authorized to practice.



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RECOMMENDATION

Adoption of Rules Governing Participation and Conduct

1. For federal agency adjudication systems in which parties are represented—either by attorneys or non-attorney representatives—agencies should consider adopting rules governing the participation and conduct of representatives in adjudicative proceedings to promote the accessibility, fairness, integrity, and efficiency of adjudicative proceedings.

Rules of Conduct

2. Agencies should consider whether to adopt or reference rules promulgated by other authorities or professional organizations or instead draft their own rules. Agencies should ensure that the rules are appropriate for the adjudicative proceedings they conduct and consider whether any modifications to adopted rules should be included. Agencies should consider whether any rules applicable to attorneys should be applied to non-attorneys and whether they should be modified before doing so.
3. Possible topics that agencies may wish to consider in their rules include actions likely to occur during a particular adjudication and actions that may occur outside a particular adjudication but that may still adversely affect the conduct of agency adjudications. Topics agencies may wish to consider include the following:
 - a. Engaging in conduct that disrupts or is intended to disrupt an adjudication;
 - b. Making unauthorized ex parte contacts with agency officials;
 - c. Engaging in representation of a client that conflicts with other interests, including representation of another client, or the attorney's personal interests;
 - d. Filing frivolous claims or asserting frivolous defenses;
 - e. Engaging in conduct that is prejudicial to the administration of justice, including conduct not limited to that occurring during an adjudication;
 - f. Failing to provide competent representation;
 - g. Improperly withdrawing from client representation;
 - h. Unreasonably delaying the conduct of an adjudication;



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- i. Making a material intentional false statement;
 - j. Improperly seeking to influence the conduct of a judge or official;
 - k. Being convicted of a crime or being subject to an official finding of a civil violation that reflects adversely on the attorney's fitness to represent clients before the agency; and
 - l. Knowingly disobeying or attempting to disobey agency rules (including conduct rules) or adjudicators' directions, or knowingly assisting others in doing so.
4. Agencies should consider whether divergence among rules governing different types of adjudicative proceedings would create needless complexity in practicing before the agency. This may entail harmonizing rules among different components of the agency. It might also involve harmonization of style or language across rules as well as cross-referencing of other rules of the agency. Agencies should also consider whether to harmonize rules across agencies, especially in cases in which the same representatives commonly appear before a group of agencies (e.g., financial agencies).

Agency Action in Response to Allegations of a Violation of Rules

5. Agencies should specify in their rules how they will respond to an allegation of a violation of their conduct rules, and they should publish these rules consistent with Paragraphs 9 through 12. Among other topics, agencies should address:
 - a. Who can make a complaint and how to make it;
 - b. How notice of a complaint should be provided to the representative who is the subject of the complaint;
 - c. Who adjudicates the complaint;
 - d. The procedure for adjudicating the complaint, including any rules governing the submission of evidence and the making of arguments;
 - e. The manner in which a decision will be issued, including any applicable timeline for issuing a decision;
 - f. Procedures for appealing a decision;
 - g. Who is responsible for enforcing the decision within the agency and



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communicating the decision to other relevant authorities; and

- h. The process for identifying and dismissing complaints that are frivolous, repetitive, meant to harass, or meant primarily to delay agency action, including any consequences for persons filing such complaints.

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- 6. Rules should address what actions an agency may take in the case of a violation of the rules consistent with their authority to do so, including informal warnings short of sanctions and the range of available sanctions.
- 7. For rules applicable to attorneys, agencies should consider whether to adopt any reciprocal disciplinary procedures or referral procedures.

Who Can Practice Before Agencies

- 8. Agencies should, in compliance with the Agency Practice Act (5 U.S.C. § 500), only establish additional rules governing which attorney representatives can practice before the agencies if authorized to do so by separate statute. With respect to non-attorneys, agencies should determine what rules, if any, they will establish to govern who can practice before the agencies.

Transparency

- 9. Agencies should publish their rules governing representatives' conduct in the *Federal Register* and codify them in the *Code of Federal Regulations*.
- 10. When agencies adopt rules promulgated by another entity, which may in some instances be copyrighted, they should ensure that the rules are available to the public at no cost and that they provide links on their website or another mechanism for easily accessing those rules.
- 11. Agencies should also publish their rules governing representatives' conduct on a single webpage or in a single document on their websites and clearly label them using a term



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such as “Rules of Conduct for Representatives.” The agency should clearly indicate whether the rules apply only to attorneys, non-attorneys, or both.

12. On the webpage or in the document described in Paragraph 11, agencies should also publish information concerning qualifications for representatives (including for non-attorneys as applicable), how to file a complaint, and a summary of the disciplinary process.
13. On the webpage or in the document described in Paragraph 11, agencies should consider providing comments, illustrations, and other explanatory materials to help clarify how the rules work in practice.
14. Agencies should consider publishing disciplinary actions, or summaries of them, on the webpage or in the document described in Paragraph 11 so as to promote transparency regarding the types of conduct that lead to disciplinary action. When necessary to preserve recognized privacy interests, the agency may consider redacting information about particular cases or periodically providing summary reports describing the rules violated, the nature of the misconduct, and any actions taken.

Model Rules

15. ACUS’s Office of the Chairman should consider promulgating model rules of conduct that would address the topics in this Recommendation. The model rules should account for variation in agency practice and afford agencies the flexibility to determine which rules apply to their adjudicative proceedings. In doing so, the Office of the Chairman should seek the input of a diverse array of agency officials and members of the public, including representatives who appear before agencies, and the American Bar Association.



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Regulation of Representatives in Agency **Adjudicative** Proceedings

Ad Hoc Committee

Proposed Recommendation | December 16, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

Commented [CMA1]: Proposed Amendment from the Ad Hoc Committee:

The Committee voted to replace the original title of this Recommendation (*Regulation of Representatives in Agency Proceedings*).

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an agency,”² though some statutes authorize agencies to impose additional qualification requirements. Agencies generally have greater discretion under the Administrative Procedure Act and agency- or program-specific statutes to determine whether persons who are not attorneys may act as representatives and, if they may, to establish the qualifications for doing so.

As a general matter, agencies have legal authority to establish rules governing the conduct of representatives and to take actions against representatives found to have violated such rules.³ Courts have consistently found such authority inherent in agencies’ general rulemaking power or their power to protect the integrity of their processes.⁴ Agencies’ disciplinary authority is not limitless, however, and agencies must determine what their governing statutes allow.

Agencies that adopt rules governing representatives will need to make a number of decisions as they decide the type of rules to adopt and how they will apply those rules. They must determine whether the rules will apply only to attorney representatives or will also apply to other representatives. They must decide whether to borrow language from rules drafted by other entities (state bars, ABA) or to draft their own rules. They must determine the particular conduct that the rules will regulate and whether to apply the same rules to attorneys and non-attorneys. And if they decide to adopt rules governing who may practice before the agency, they must ensure that they comply with the Agency Practice Act for rules applied to attorneys and determine the qualification standards, if any, they will establish for non-attorneys.

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15. ACUS’s Office of the Chairman should consider promulgating model rules of conduct that would address the topics in this Recommendation. The model rules should account for variation in agency practice and afford agencies the flexibility to determine which rules apply to their adjudicative proceedings. In doing so, the Office of the Chairman should seek the input of a diverse array of agency officials and members of the public, including representatives who appear before agencies, and the American Bar Association.



Quality Assurance Systems in Agency Adjudication

Joint Ad Hoc Committee of the Committee on Adjudication and Committee on Administration and Management

Proposed Recommendation | December 16, 2021

1 A quality assurance system is an internal review mechanism that agencies use to detect
2 and remedy both problems in individual adjudications and systemic problems in agency
3 adjudicative programs. Through well-designed and well-implemented quality assurance systems,
4 agencies can proactively identify both problems in individual cases and systemic problems,
5 including misapplied legal standards, inconsistent applications of the law by different
6 adjudicators, procedural violations, and systemic barriers to participation in adjudicatory
7 proceedings (such as denials of reasonable accommodation). Identifying such problems enables
8 agencies to ensure adherence to their own policies and improve the fairness (and perception of
9 fairness), accuracy, inter-decisional consistency, timeliness, and efficiency of their adjudicative
10 programs.¹

11 In 1973, the Administrative Conference recommended the use of quality assurance
12 systems to evaluate the accuracy, timeliness, and fairness of adjudication of claims for public
13 benefits or compensation.² Since then, many agencies, including those that adjudicate other types
14 of matters, have implemented or considered implementing quality assurance systems, often to

¹ Daniel E. Ho, David Marcus & Gerald K. Ray, Quality Assurance Systems in Agency Adjudication (Nov. 15, 2021) (draft report to the Admin. Conf. of the U.S.).

² Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16840 (June 27, 1973).



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15 supplement other internal review mechanisms such as agency appellate systems.³ Unlike
16 agencies' appellate systems, quality assurance systems are not primarily concerned with error
17 correction in individual cases, and they may assess numerous adjudicatory characteristics that are
18 not typically subject to appellate review, such as effective case management. Nor are they
19 avenues for collateral attack on individual adjudicatory dispositions. Also, quality assurance
20 systems are distinct from agencies' procedures that deal with allegation of judicial misconduct.
21 This Recommendation accounts for these developments and provides further guidance for
22 agencies that may wish to implement new or to improve existing quality assurance systems.

23 How agencies structure their quality assurance systems can have important consequences
24 for their success. For example, quality assurance systems that overemphasize timeliness as a
25 measure of quality may overlook problems of decisional accuracy. Quality assurance personnel
26 must have the expertise and judgment necessary to accurately and impartially perform their
27 responsibilities. Quality assurance personnel must use methods for selecting and reviewing cases
28 that allow them to effectively identify case-specific and systemic problems. Agencies must
29 determine how they will use information collected through quality assurance systems to correct
30 problems that threaten the fairness (and perception of fairness), accuracy, inter-decisional
31 consistency, timeliness, and efficiency of their adjudicative programs. Agencies also must design
32 quality assurance systems to comply with all applicable requirements, such as the statutory
33 prohibition against rating the job performance of or granting any monetary or honorary award to
34 an administrative law judge.⁴

35 There are many methods of quality review that agencies can use, independently or in
36 combination, depending upon the needs and goals of their adjudicative programs. For example,
37 agencies can adopt a peer review process by which adjudicators review other adjudicators'
38 decisions and provide feedback before decisions are issued. Agencies can prepare and circulate
39 regular reports for internal use that describe systemic trends identified by quality assurance

³ Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021).

⁴ See, e.g., 5 U.S.C. § 4301; 5 C.F.R. § 930.206.



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personnel. Agencies can also use information from quality assurance systems to identify training needs and clarify or improve policies.

Agencies, particularly those with large caseloads, may also benefit from using data captured in electronic case management systems. Through advanced data analytics and artificial intelligence techniques (e.g., machine-learning algorithms), agencies can use such data to rapidly and efficiently identify anomalies and systemic trends.⁵

This Recommendation recognizes that agencies have different quality assurance needs and available resources. What works best for one agency may not work for another. What quality assurance techniques agencies may use may also be constrained by law. Agencies must take into account their own unique circumstances when implementing the best practices that follow.

RECOMMENDATION

Review and Development of Quality Assurance Standards

1. Agencies with adjudicative programs that do not have quality assurance systems—that is, practices for assessing and improving the quality of decisions in adjudicative programs—should consider developing such systems to promote fairness, the perception of fairness, accuracy, inter-decisional consistency, timeliness, efficiency, and other goals relevant to their adjudicative programs.
2. Agencies with adjudicative programs that have quality assurance systems should review them in light of the recommendations below.
3. Agencies' quality assurance systems should assess whether decisions and decision-making processes:
 - a. Promote fairness and the appearance of fairness;
 - b. Accurately determine the facts of the individual matters;

⁵ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30686 (June 29, 2018).



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- c. Correctly apply the law to the facts of the individual matters;
 - d. Comply with all applicable requirements;
 - e. Are completed in a timely and efficient manner; and
 - f. Are consistent across all adjudications of the same type.
4. Agencies should consider both reviews that address decisions' likely outcomes before reviewing tribunals, and reviews of adjudicators' decisional reasoning, which address policy compliance, consistency, and fairness.
 5. A quality assurance system should review the work of adjudicators and all related personnel who have important roles in the adjudication of cases, such as attorneys who assist in drafting decisions, interpreters who assist in hearings, and staff who assist with development of evidence.
 6. Analyzing decisions of agency appellate and judicial review bodies may help quality assurance personnel assess whether the adjudicatory process is meeting the goals outlined in Paragraph 3. But agencies should not rely solely on such decisions to set and assess standards of quality because appealed cases may not be representative of all adjudications.

Quality Assurance Personnel

7. Agencies should ensure that quality assurance personnel can perform their functions in a manner that is, and is perceived as, impartial, including being able to perform such functions without pressure, interference, or expectation of employment consequences from the personnel whose work they review.
8. Agencies should ensure that quality assurance personnel understand all applicable substantive and procedural requirements and have the expertise necessary to review the work of all personnel who have important roles in adjudicating cases.
9. Agencies should ensure that quality assurance personnel have sufficient time to fully and fairly perform their assigned functions.
10. Agencies should consider whether quality assurance systems should be staffed by permanent or temporary personnel, or some combination of the two. Personnel who



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perform quality assurance functions on a permanent basis may gain more experience and institutional knowledge over time than will personnel who perform on a temporary basis. Personnel who perform quality assurance on a temporary basis, however, may be more likely to contribute different experiences and new perspectives.

Timing of and Process for Quality Assurance Review

11. Agencies should consider at what points in the adjudication process quality assurance review should occur. In some cases, review that occurs before adjudicators issue their decisions, or during a period when agency appellate review is available, could allow errors to be corrected before decisions take effect. However, agencies should take care that pre-disposition review does not interfere with adjudicators' qualified decisional independence and comports with applicable restrictions governing ex parte communications, internal separation of decisional and adversarial personnel, and decision making based on an exclusive record.
12. Agencies should consider implementing peer review programs in which adjudicators can provide feedback to other adjudicators.
13. Agencies should consider a layered approach to quality assurance that employs more than one methodology. As resources allow, this may include formal quality assessments and informal peer review on an individual basis, sampling and targeted case selection on a systemic basis, and case management systems with automated adjudication support tools.
14. In selecting cases for quality assurance review, agencies should consider the following methods:
 - a. Review of every case, which may be useful for agencies that adjudicate a small number of cases but impractical for agencies that decide a high volume of cases;
 - b. Random sampling, which can be more efficient for agencies that decide a high volume of cases but may cause quality assurance personnel to spend too much time reviewing cases that are unlikely to present issues of concern;
 - c. Stratified random sampling, a type of random sampling that over-samples cases based on chosen characteristics, which may help quality assurance personnel



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focus on specific legal issues or factual circumstances associated with known problems, but may systematically miss certain types of problems; and

- d. Targeted selection of cases, which allows agencies to directly select decisions that contain specific case characteristics and may help agencies study known problems but may miss identifying other possible problems.

Data Collection and Analysis

15. Agencies, particularly those with large caseloads, should consider what data would be useful and how it could be used for quality assurance purposes. Agencies should ensure that, for each case, an electronic case management or other system includes the following information:

- a. The identities of adjudicators and any personnel who assisted in evaluating evidence, writing decisions, or performing other case-processing tasks;
- b. The procedural history of the case, including any actions and outcomes on administrative or judicial review;
- c. The issues presented in the case and how they were resolved; and
- d. Any other data the agency determines to be helpful.

16. Agencies should regularly evaluate their electronic case management or other systems to ensure they are collecting the data necessary to assess and improve the quality of decisions in their programs.

17. Agencies, particularly those with large caseloads, should consider whether to use data analytics and artificial intelligence (AI) tools to help quality assurance personnel identify potential errors or other quality issues. Agencies should ensure that they have the technical capacity, expertise, and data infrastructure necessary to build and deploy such tools; that any data analytics or AI tools the agencies use support, but do not displace, evaluation and judgment by quality assurance personnel; and that such systems comply with legal requirements for privacy and security and do not unintentionally create or exacerbate harmful biases.



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Use of Quality Assurance Data and Findings

- 141 18. Agencies should not use information gathered through quality assurance systems in ways
142 that could improperly influence decision making or personnel matters.
- 143 19. Agencies should provide, consistent with Paragraph 11, individualized feedback for
144 adjudicators and other personnel who assist in evaluating evidence, writing decisions, or
145 performing other case-processing tasks within a reasonable amount of time and include
146 any relevant positive and negative feedback.
- 147 20. Agencies should establish regular communications mechanisms to facilitate the
148 dissemination of various types of quality assurance information within the agency.
149 Agencies should:
- 150 a. Communicate information about systemic recurring or emerging problems
151 identified by quality assurance systems to all personnel who participate in the
152 decision-making process and to training personnel;
 - 153 b. Communicate, as appropriate, with agency rule-writers and operations support
154 personnel to allow them to consider whether recurring problems identified by
155 quality assurance systems should be addressed or clarified by rules, operational
156 guidance, or decision support tools; and
 - 157 c. Consider whether to communicate information to appellate adjudicators or other
158 agency officials who are authorized to remedy problems identified by quality
159 assurance systems in issued decisions.

Public Disclosure and Transparency

- 160 21. Agencies should provide access on their websites to all rules and any associated
161 explanatory materials that apply to quality assurance systems, including standards for
162 evaluating the quality of agency decisions and decision-making processes.
- 163 22. Agencies should consider whether to publicly disclose data in case management systems
164 in a de-identified form (i.e., with all personally identifiable information removed) to
165 enable continued research by individuals outside of the agency.



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Assessment and Oversight

- 166 23. Agencies with quality assurance systems should periodically assess whether those
167 systems achieve the goals they were intended to accomplish, including by affirmatively
168 soliciting feedback from the public, adjudicators, and other agency personnel concerning
169 the functioning of their quality assurance systems.



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Proposed Amendments

This document displays manager's amendments and an additional amendment from the Council (with source shown in the margin).

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How agencies structure their quality assurance systems can have important consequences for their success. For example, quality assurance systems that overemphasize timeliness as a measure of quality may overlook problems of decisional accuracy. Quality assurance personnel must have the expertise and judgment necessary to accurately and impartially perform their responsibilities. Quality assurance personnel must use methods for selecting and reviewing cases that allow them to effectively identify case-specific and systemic problems. Agencies must determine how they will use information collected through quality assurance systems to correct problems that threaten the fairness (and perception of fairness), accuracy, inter-decisional consistency, timeliness, and efficiency of their adjudicative programs. Agencies also must design quality assurance systems to comply with all applicable requirements, such as the statutory prohibition against rating the job performance of or granting any monetary or honorary award to an administrative law judge.⁴

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38 decisions and provide feedback before decisions are issued. Agencies can prepare and circulate
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16. Agencies should regularly evaluate their electronic case management or other systems to ensure they are collecting the data necessary to assess and improve the quality of decisions in their programs.
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Commented [CA1]: Proposed Amendment from Council

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- Agencies should:
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